153 U S 109

RECORD, CASE No. 14,126.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 166.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, AND EDWIN S. TOWLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 1, 1890.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska at the term of May, A. D. 1889.

Be it remembered that on the 25th day of March, A. D. 1879, a transcript was filed in the office of the clerk of said circuit court; which said transcript is in words and figures following, to wit:

UNITED STATES OF AMERICA,
The State of Nebraska, County of Richardson, } ss:

Transcript.

J. D. HEGLER
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, EDWIN S. TOWLE.

Pleas before the Hon. A. J. Weaver, judge first judicial district of Nebraska, sitting within and for Richardson county.

Be it remembered that at a regular term of said district court, begun and held at the court-house, in Falls City, in said county, on the 12th day of March, 1879, and on the 8th day of said term, being the 20th day of March, 1879, there being present the Hon. A. J. Weaver, judge, presiding; G. H. Pearson, sheriff; T. C. Cunningham, clerk, and P. E. Beardsley, stenographer, the following business was had and done among other, to wit:

October 4th, 1878, came J. D. Hegler, by his attorney, J. H. Broady, Esq., and filed the following petition, to wit:

Petition.

In the District Court of Richardson County, Nebraska.

2 J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUST SCHOENHEIT, and EDWIN S. TOWLE, Defendants. } Petition.

The plaintiff says he has a legal estate in and is entitled to the possession of the following-described premises, situated in said county of Richardson, to wit: The north half of section eight (8), in township two (2) north, of range seventeen (17) east, containing 320 acres, more or less.

The defendants have for a long time past unlawfully kept the plaintiff out of the possession of said premises.

The plaintiff, for his second cause of action, alleges that the defendants, whilst they unlawfully kept the plaintiff out of the pos-

session of said premises, as above stated, have received the rents and profits of said premises, of the value of twenty-five hundred dollars, and refuse to account for or pay the plaintiff any part of said rents or profits.

The plaintiff asks judgment for the delivery of the possession of said premises to him, and also for the sum of twenty-five hundred dollars on account of said rents and profits and costs of suit.

J. H. BROADY,
Att'y for Plaintiff.

STATE OF NEBRASKA, } ss :
County of Nemaha, }

I, J. H. Broady, being first duly sworn, say I am attorney for the said plaintiff, who is a non-resident of and absent from said State; that the facts stated and allegations made in the foregoing petition are true, as I believe.

J. H. BROADY.

Subscribed in my presence and sworn to before me this 1st day of Oct., 1878.

WILLIAM H. HOOVER,
Clerk District Court, Nemaha Co., Nebraska.

3 And on same day said attorney also filed his præcipe for summons as follows:

Præcipe for Summons.

In the District Court of Richardson County, Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUST SCHOENHEIT, & EDWIN S. TOWLE, Defendants. } Præcipe.

The clerk of said court will please issue summons in the above action and indorse, as claimed: Twenty-five hundred dollars and the north half of sec. 8, township 2, range 17 east, in Richardson county, Neb., and costs of suit.

J. H. BROADY,
Att'y for Plaintiff.

And thereupon, on the same day, the following summons was issued:

Summons.

Case No. 706.

STATE OF NEBRASKA, } ss :
County of Richardson, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify George Faulkner, James Cottier, August Schoenheit, and Edwin S. Towle, defendants, that

they have been sued by J. D. Hegler, plaintiff, in the district court of the first judicial district in and for Richardson county, Nebraska, and unless they answer by the 4th day of November, 1878, the petition of said plaintiff, filed against them in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

4 You will make due return of this writ on or before the 14th day of October, 1878.

Witness my hand and the seal of said court, at Falls City, this 4th day of October, 1878.

[SEAL.] T. C. CUNNINGHAM, *Clerk.*

Summons endorsed: The plaintiff in this action claim- judgment for the sum of $2,500.00 and the north half of sec. 8, township two, range seventeen east, in Richardson county, Nebraska.

Sheriff's Return.

STATE OF NEBRASKA, } ss:
Richardson County, }

Received this writ this 4th day of October, 1878, at 5 o'clock p. m.; and I hereby certify that I presented this writ to Ed. S. Towle and he then and there, on the 11th day of October, 1878, accepted service for each of the within-named defendants.

Witness my hand this 11th day of October, 1878.

G. H. PEARSON, *Sheriff,*
By ALEX. KERR, *Deputy.*

Service Accepted.

We, the undersigned, hereby acknowledge to have rec'd from the sheriff of Richardson county, Neb., a certified copy of the within summons, together with all the endorsements thereon, and we hereby accept service and enter appearance in this cause.

GEORGE FAULKNER AND
JAMES COTTIER,
By SCHOENHEIT, THOMAS & TOWLE,
Their Att'ys.

ED. S. TOWLE.
AUG. SCHOENHEIT.

Oct. 11, 1878.

Returned and filed Oct. 11th, 1878.

CUNNINGHAM, *Clerk.*

Returned filed.

Sheriff's Fees.

Mileage	10
Copies	1 00
Service	1 25
Total	$2 25

5 *Motion for Sec. for Costs.*

And afterwards, on the 11th day of October, 1878, came defendants, by Schoenheit, Thomas and Towle, and filed the following motion for security for costs:

In the District Court of Richardson County, State of Nebraska.

J. D. HEGLER
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, and EDWIN S. TOWLE.

And now comes the said def'ts above named, by their att'ys, Schoenheit, Thomas & Towle, and moves the court to compel the plaintiff herein to give security for costs in this action within a certain time to be fixed by the court, or in default thereof that this cause stand dismissed.

The ground of this motion being the reason that said pl'ff is a non-resident of the State of Nebraska, as shown by the face of the pleadings filed herein.

Oct. 11th, 1878.

SCHOENHEIT, THOMAS & TOWLE,
Att'ys for Def'ts.

And afterwards, on the 15th day of March, 1879, again came said defendants, by their said attorneys, Schoenheit, Thomas & Towle, and filed the following petition and bond for removal of this cause to U. S. circuit court, to wit:

Petition for Removal.

In the District Court of Richardson County, State of Nebraska.

J. D. HEGLER
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, and EDWIN S. TOWLE.

6 Petition for removal to the circuit court of the United States, district of Nebraska.

To said Richardson county district court:

Your petitioners, George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, respectfully shows to this honorable court that the matters and amounts in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Nebraska

Each of said petitioners above named and defendants herein, to wit George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, were then and still are citizens of Richardson county and State of Nebraska.

That said plaintiff above named, J. D. Hegler, was at the commencement of this suit and still is a citizen of the State of Ohio.

And your petitioner- offers hereinafter a bond, with good and sufficient surety, for their entering in said circuit court of United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this hon. court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Nebraska; and they will ever pray.

SCHOENHEIT, THOMAS & TOWLE,
Att'ys for Petitioners.

7 THE STATE OF NEBRASKA, } ss:
Richardson County, }

I, Edwin S. Towle, being first duly sworn, do say that I am a member of the firm of Schoenheit, Thomas & Towle, the attorneys for petitioners in the above-entitled cause, and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

EDWIN S. TOWLE.

Subscribed by the said Edwin S. Towle in my presence and by him sworn to before me this 15th day of March, 1879.

T. C. CUNNINGHAM, *Clerk.*

Bond.

Know all men by these presents that we, George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, as principal-, and J. D. Gilman and P. W. Birkhauser, as surety, are held and firmly bound unto J. D. Hegler in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made unto the said J. D. Hegler, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions:

The said George Faulkner, James Cottier, August Schoenheit, & Edwin S. Towle having petitioned the district court of Richardson county, State of Nebraska, for the removal of a certain cause therein pending, wherein J. D. Hegler is plaintiff and said George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle are defendants, to the circuit court of the United States in and for the district of Nebraska:

Now, if the said George Faulkner, James Cottier, August Schoen-

heit, & Edwin S. Towle, your petitioners, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the records in said suit and shall well and truly pay
8 all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands & seals this 15th day of March, 1879.

GEORGE FAULKNER, [SEAL.]
JAMES COTTIER, [SEAL.]
AUGUSTUS SCHOENHEIT &
EDWIN S. TOWLE, [SEAL.]
By their attorneys of record, SCHOENHEIT, THOMAS & TOWLE.
J. D. GILMAN. [SEAL.]
P. W. BIRKHAUSER. [SEAL.]

This bond approved and surety accepted this 15th day of March, 1879.

[SEAL.] T. C. CUNNINGHAM, *Clerk.*

And afterwards, on the 20th day of March, 1879, in open court, upon motion of defendants, the following order is entered in the journal of said court, to wit:

J. D. HEGLER
vs.
GEO. FAULKNER, JAS. COTTIER, A. SCHOENHEIT, E. S. TOWLE. } General No., 706.

Now, this day, upon the motion of defendants, and it appearing that a proper petition and bond has been by said defendants filed in this cause, setting forth lawful cause for removal of this cause to the United States court, this court proceed no further in said cause.

STATE OF NEBRASKA, *Richardson County,* } *ss:*

I, T. C. Cunningham, clerk of the district court within and for said county, certify the above and foregoing to be a true and complete copy and transcript of all the papers and record in the cause wherein J. D. Hegler is plaintiff and George Faulkner, James Cottier, Aug. Schoenheit, and Ed. S. Towle are defendants, and numbered 706, as the same appears of record in my said office.

Witness my hand and official seal, at Falls City, this 20th day of March, 1879.

[SEAL.]

T. C. CUNNINGHAM, *Clerk,*
By W. S. STRETCH, *Deputy,*
By W.

Costs: Plaintiff's		6 98	
Defendants'		1 15	
			8 13
This transcript		2 50	2 50

Fee of transcript paid by def't-.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 107, E. J. D. Hegler *vs.* Geo. Faulkner *et al.* Transcript. Filed Mar. 25, 1879. Watson B. Smith, clerk.

9 Thereupon, afterwards, at the May term of said circuit court, on the 6th day of May, 1879, the following proceedings were had and done in said case, as appears of record on folio 384, Journal "E" of said court, to wit:

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } 107, E.

On motion of said defendants, by Messrs. Schoenheit, Thomas & Towle, their attorneys, leave is hereby granted them to answer in 30 days, and plaintiff is ruled to reply in 50 days and cause continued.

Thereupon, afterwards, to wit, on the 17th day of May, 1879, an answer was filed in said case; which said answer is in words and figures following, to wit:

Answer of Defendants.

In the Circuit Court of the U. S., Dist. of Nebraska.

J. D. HEGLER
vs.
GEO. FAULKNER, AUG. SCHOENHEIT, JAMES COTTIER, & EDWIN S. TOWLE.

And now come the said def'ts above named and for answer to the petition of plaintiff filed herein say—

That it is not true, and they therefore deny, that the said plaintiff is the owner of or has a legal estate or title to the land in controversy.

Defendants, further answering, deny that they or any of them unlawfully keep the said plaintiff out of the possession of said demanded premises. Defendants further say that they are the owners in fee simple of said land and that said plaintiff has not now nor ever had any legal estate therein, but that the legal estate of the — is vested in them.

10 Wherefore def'ts ask that they may be hence dismissed with their costs herein incurred.

SCHOENHEIT & TOWLE,
Att'ys for Def'ts.

UNITED STATES OF AMERICA, } ss:
State of Nebraska, }

Edwin S. Towle, being first duly sworn, says that he is one of the def'ts in the above-entitled cause, and that the matters, facts, & allegations contained in the foregoing answer are true, as he believes.

EDWIN S. TOWLE.

Subscribed in my presence and sworn to before me this 7th day of May, 1879.

WATSON B. SMITH,
Clerk U. S. Court,
By E. D. FRANK, *Deputy.*

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 107, E. J. D. Hegler *vs.* Faulkner *et al.* Answer of def'ts. Filed May 17th, 1879. Watson B. Smith, clerk. Schoenheit & Towle, att'ys for def'ts.

Thereupon, afterwards, to wit, on the 11th day of December, 1882, a stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIR, and E. S. TOWLE, Def'ts.

It is agreed by and between the parties hereto that the amount in controversy in this action exceeds five thousand dollars, and that the land involved in this action is worth more than five thousand dollars.

December 8, 1882.

11 SCHOENHEIT & TOWLE,
Att'ys for Def'ts.
J. H. BROADY, *Att'y for Pl'ff.*

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 107, E. J. D. Hegler *vs.* George Faulkner *et al.* Stipulation. Filed Dec. 11, 1882. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 7th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 733, Journal "I" of said court, to wit:

J. D. HEGLER
vs.
GEO. FAULKNER *et al.* } 107, E.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, G. B. Hamilton; 2, Wm. Dennis; 3, Geo. C. Ames; 4, Geo. Ralsten; 5, Roderick McGrath; 6, Chas. P. Burkett; 7, Henry Shaw; 8, Thomas Bryant; 9, R. C. Manley; 10, A. A. Carman; 11, L. W. Coats; 12, Geo. S. McGrew, who were duly empaneled and sworn according to law, and, the said jury having heard the testimony adduced in part, said cause was continued until tomorrow morning at ten o'clock.

Thereupon, afterwards, at the said January term of said court, on the 9th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 754, Journal "I" of said court, to wit:

Cause Submitted to Jury.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } No. 107, E.

12 On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein, and thereupon, after hearing the remaining evidence, the argument of counsel, and charge of the court, said jury retire to their room in charge of a bailiff duly sworn for deliberation.

Thereupon, afterwards, at the said January term of said court, on the 10th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 757, Journal I of said court, to wit:

Verdict & Judgment.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } 107, E.

Now, on this day, again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein into open court, and present to the court their verdict, which is in words and figures following, to wit:

In the United States Circuit Court for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUST SCHOENHEIT, and EDWIN S. TOWLE, Defendants.

We, the jury empaneled and sworn in the above-entitled cause, do find all the issues in this cause with the defendants.

GEO. C. AMES, *Foreman.*
THOMAS BRYANT.
W. J. DENNIS.
RODERICK McGRATH.
G. W. RALSTEN.
HENRY SHAW.
GEO. S. McGREW.
A. A. CARMON.
G. B. HAMILTON.
L. W. COATES.
R. C. MANLEY.
CHARLES P. BIRKETT.

It is thereupon considered, ordered, and adjudged by the court that the defendants are the owners of the land involved in
13 this action, to wit, the northeast quarter of section eight, town. two (2), range seventeen (17) east, 160 acres, and thirty (30) acres off the east side of the northeast quarter of the northwest quarter of said section and thirty acres off the east side of the southeast quarter of the northwest quarter of said section, in the aggregate 220 acres, situate in Richardson county, State of Nebraska, and were at the commencement of this suit, and that said defendants were then and still are entitled to possession thereof, and that the plaintiff's claim of title to said land was and is invalid, and said plaintiff was not at the commencement of this action and is not now entitled to the possession of said land.

It is further ordered by the court that said defendants have and recover of and from the said plaintiff their costs herein expended, taxed at $——.

Thereupon, afterwards, to wit, on the 13th day of January, 1885, a motion for new trial was filed in said case; which said motion for new trial is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, AUGUST SCHOENHEIT, JAMES COTTIER, & EDWIN S. TOWLE, Defendants.

Now comes the plaintiff and moves the court here to set aside the verdict of the jury and for a new trial in this action because—

1st. That the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

2nd. Error of law occurring at the trial and excepted to by the plaintiff.

3rd. Because the court erred in excluding from evidence
14 the answer of the defendant filed in the district court of Richardson county, Nebraska, Dec. 29, 1891, in the suit by this plaintiff against these defendants concerning the land in controversy; to which plaintiff at the time excepted.

4th. Because the court excluded from the jury, as evidence tending to show the age of George Washington, son of Logarash, the official census list furnished by the department to Mr. Stark, the allotment commissioner, which census list was offered for that purpose by the plaintiff, and the same was for such purpose excluded by the court; to which plaintiff at the time excepted.

5th. The court erred in excluding from evidence the official and authenticated copy of instructions given by the department to Mr. Stark for his guidance in discharge of his duties as allotment commissioner; to which plaintiff then excepted.

6th. The court erred in excluding from the jury the answer of the second interrogatory in the deposition of the witness Stark, and in excluding from the jury that part of the answer to the 3rd interrogatory in deposition of said witness Stark, as the same appear at pages 59 to 61 of transcript from the State court; to the exclusion of which evidence plaintiff then excepted.

7th. The court erred in excluding from the jury evidence offered by the plaintiff and excluded; to which plaintiff at the time excepted.

8th. The court erred in admitting in evidence the evidence offered by defendants and objected to by the plaintiff and admitted by the court; to which plaintiff at the time excepted.

9th. The court erred in refusing to give to the jury the fifth (5) instruction requested by the plaintiff and refused by the court; to which the plaintiff then excepted.

15 10th. The court erred in its oral charge to the jury, reported and transcribed by the stenographer and hereto attached and made a part of this motion, in those certain portions of said charge marked and designated—

1st. As lines 16 to 24 of page 5 of said charge.
2nd. Line 33, page 5, to line 14, page 6.
3rd. Line- 1 to 16, page 7.
4th. Line- 17 to 29, page 7.
5th. Line- 9 to 32, page 8.
6th. Lines 16 to 32, page 9.
7th. Line 7, page 10, to line 2, page 11.
8th. Line 3 to line 9, page 11.
9th. Line 27, page 11, to line 8, page 12.
10th. Line 2, page 12, to line 7, page 12.
11th. Lines 9 to 23, page 12.

To which charge plaintiff at time excepted.

J. R. WEBSTER,
Att'y — Pl'ff.

Upon the back of said motion for new trial appear endorsements in words and figures following, to wit: No. 107, E. J. D. Hegler *vs.* George Faulkner *et al.* Motion for new trial. Filed Jan'y 13, 1885. Elmer D. Frank, clerk. J. R. Webster, for plaintiff.

Thereupon, afterwards, to wit, on the 5th day of June, 1885, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

Stipulation.

In U. S. Circuit Court, District of Nebraska.

J. D. HEGLER, Pl'ff,
vs.
GEORGE FAULKNER, JAMES COTTIER, EDWIN S. TOWLE, and AUGUST SCHOENHEIT, Def'ts.

16 It is stipulated on behalf of the plaintiff and defendants herein that the plaintiff have thirty days to make and submit to defendants' counsel his bill of exceptions, and that the same be, when settled, signed and sealed as of the January term of court; this cause in Supreme Court to be heard on printed briefs and argument, oral argument being waived, but cause not to be advanced on docket of Supreme Court without consent of parties on both sides.

Falls City, May 20th, '85.

J. R. WEBSTER, *For Pl'ff.*
A. SCHOENHEIT,
In Personam and Att'y for the Other Def'ts.
EDWIN S. TOWLE, *In Person.*
ISHAM REAVIS,
Att'y for James Cottier.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 107, E. U. S. circuit court, district of Nebraska. James D. Hegler *vs.* George Faulkner *et al.* Stipulation. Filed June 5, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, at the May term of said court, on the 6th day of June, 1885, the following proceedings were had and done, as appears of record on folio 193, Journal K of said court, to wit:

Motion for New Trial Overruled.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } 107, E.

This cause came on for hearing on the motion of the plaintiff herein to set aside the verdict and for a new trial herein, and the court, on consideration thereof, does now on this day overrule the same.

Thereupon, afterwards, to wit, on the 6th day of June, 1885, a bill of exceptions was filed in said case; which said bill of exceptions is in words and figures following, to wit:

JAMES D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER *et al.*

17 Be it remembered that on the trial of the above-entitled cause at the January, 1885, term of the district and circuit courts of the United States in and for the district of Nebraska the following proceedings were had:

LINCOLN, NEBRASKA, *January 7th*, 1885.

The above-entitled cause coming on this day to be heard before his honor E. S. Dundy and a jury, J. R. Webster, Esq., appear*ing* for the plaintiff and Reavis, Towle and Schoenheit appeared for the defendants, and testimony was taken as follows:

The plaintiff offers in evidence the exemplification from the records of the Indian department of the instructions under which Mr. Stark acted in making the allotment.

Objected to as irrelevant, immaterial.

The plaintiff states that he offers this testimony for the purpose of showing that the man was of full age and was not a minor.

Objection sustained. Plaintiff excepts; which exception is hereto annexed, marked A, and made a part of this bill.

The plaintiff offers in evidence a certified copy of (this bill, page 26) the allotment.

Objected to as immaterial and irrelevant. Offered for the same reason as above. Sustained. Plaintiff excepts; which copy is hereto annexed, marked B, and made a part hereof (page 26, this bill).

The plaintiff offers in evidence a certified copy of the patent of the land in controversy.

Objected to on the ground that before he can offer a certified copy or a deed record he must show the loss of the original. Objection overruled. Defendant excepts. A copy of the patent is hereto attached, marked Exhibit C, and made a part hereof, page 27, this bill.

The plaintiff offers in evidence the conveyance of this allotment from George Washington to Houston Nuckels previous to
18 the date of this patent, dated April 16th, 1859, the patent being dated in 1860.

Objected to on the ground that the allotment was made before the issuance of the patent; that until after the patent was issued the Indian had no title to the land; that if it could have any effect at all it would have to have the effect of a deed; that the object of this is to prove a deed from George Washington to Nuckolls—they issued first an allotment certificate, and on the back of the allotment certificate is issued a certificate that they attempted to introduce to show the transfer to prove a deed thereby; that there is no acknowledgment to this as a deed such as our statutes require, and that there is nothing connecting the assignment of that paper.

Sustained. Plaintiff excepts; which copy is hereto annexed, marked D, and made a part thereof, being on same sheet as "B" above (page 26, this B.).

The plaintiff offers in evidence a certified copy of the deed from Geo. Washington to Houston Nuckols, conveying the land in question, being the north half of section 8, township 2, range 17, containing 320 acres, acknowledged April 16th, 1859, dated April 15th, 1859.

Objected to on the ground that the loss of the original is not shown, immaterial; that there is no title in George Washington to convey, and when the patent was issued and he conveyed it to somebody else that was where the title commenced. The offer considered pending, hereto annexed, marked "E," and made a part hereof (page 27, this bill).

The plaintiff offers in evidence the deposition of Mr. Stark, taken the 22nd day of September, 1875.

Objected to on the ground that a legal title cannot be made up from oral testimony; it must be by recorded evidence and a change of title from the original patentee reaching up to the claimants in this case in order to make a *prima facie* case in order to establish the fact that the legal title is in the plaintiff; that — one of
19 the deeds referred to in the deposition the description of the land is not made, and Mr. Stark undertakes to say that he compared the original deed and the original deed contained a true description, hereto annexed, marked F, and made a part thereof. Admitted. Def't excepted (page 27, this bill).

The plaintiff offers in evidence the deeds contained in the deposition just referred to and offered in evidence, the north half of section 8, township 2, range 17.

Objected to on the ground that it does not describe any township; there is no *bona fide* purchaser for value without notice of possession. The deed of George Washington to Nuckols is on record and is in for good, and every subsequent purchaser by the record is charged with the knowledge of that part. Annexed as part of said deposition and made part hereof (page 27 of this bill), marked E.

The plaintiff offers in evidence the deed from Nuckols and wife to Ballard, attached to the deposition last offered.

Objected to as last above. Overruled. Defendant excepts. The deed is hereto attached to said deposition, marked Exhibit —, and made a part hereof, — 27 this bill.

The plaintiff offers in evidence a copy of a deed from A. S. Ballard to James McMillan, attached to said deposition, and objected to on the ground that the original is not accounted for; that this deed shows on its face that it was not entitled for record in Richardson county, and therefore, not being entitled for record, a certified copy could not be offered; that it is acknowledged before a justice of the peace, John D. Johnson, in the county of Green, State of Ohio; that the certificate does not show that the deed was executed according to the laws of the State of Ohio; that the original would not be competent evidence. Offer pending, which is attached to said deposi-

tion and thereto annexed and made a part hereof (page 30 of this bill).

The plaintiff offers in evidence a copy of a deed from Mc-
20 Millan to Hegler of the same land in controversy.

Objected to on the same ground. They have not shown the loss of the original; it is not certified that this deed was executed according to the laws of the State of Ohio.

Sustained. Plaintiff excepts; which is hereto annexed, marked G, and made part hereof (page 31, this bill).

On account of the absence of witnesses for the plaintiff, it is agreed that the following testimony may be taken on behalf of the defendant:

Chauncey Norris.

From May, 1866, to June, 1869, I was Indian agent at the Great Nemaha or Iowa agency; knew a half-breed or mixed blood by the name of George Washington; think he was living with my father. He was son of Nagarash, head chief of the Iowas. I knew him all the time I was there and for six months before. I have no means of knowing his age positively, but in my judgment he was from 20 to 22 years old in 1866; in my judgment he could not possibly have been 21 years old in 1859.

Cross-ex.:

When my attention was first called to George Washington in fall of 1865 I was a general merchant in Falls City; was not acquainted with him so long ago as April, 1859, and do not know what his appearance then was.

E. S. Towle.

I am one of the defendants; was acquainted with George Washington from the fall or winter of 1862; can speak of his age then only by his appearance, size, general make-up, and build. In 1862 he was a slip of a boy; grew to be at least a foot higher afterwards; from eight inches to a foot. When he died he was a man six feet and two or three inches. (Patent for land in controversy produced.) I received it (the patent) from George Washington's own hands. His father, Lagarash, was with him.

Patent introduced in evidence, H, page 40, this bill.

21 (Recognized another instrument.) This is a deed from George Washington to Mr. Schoenheit and myself; is the original.

Deed offered in evidence. Plaintiff objects. The officer taking the acknowledgment does not certify that he personally knows the grantor, nor yet that the grantor's identity is satisfactorily proved to him, and instrument is incomplete. Overruled and deed admitted—Exhibit J, this bill, page 40.

Witness continues: This (recognizing another instrument) is a deed made February 28, 1868. He had been married since making

the first deed. This deed was made because we had doubt whether he was of age when the first deed was made to us, and we got him and his wife to make another deed. When I first knew George Washington he was 19 years old in the summer before. He was much more of a boy than I was—much smaller—not near so tall as I was, and he grew to be 5 or 6 inches taller than I.

Deed of 28 Feb., '68, offered by defendants. Plaintiff objected—acknowledgment is sufficient and informal and deed is competent to be read in evidence. Overruled. Deed admitted. Plaintiff excepts. Deed at page 40, this bill, K.

Cross-exm.:

At time I negotiated with George Washington for his conveyance I had information of Hegler's claim on the land. George Washington mentioned making a deed to Nuckolls. I knew Geo. Washington first in the fall of 1862; was not acquainted with the land till 1864; there were no improvements on the land at the time of conveyance to us.

Elisha Deroin deposition offered and read on behalf of defendants, hereto attached and made part hereof and marked L, page 41, this bill.

Lag-gar-ash deposition offered and read on behalf of de-
22 fendants, hereto attached and made part hereof and marked M, page 42, this bill.

LINCOLN, NEBRASKA, *January 8th*, 1885.

The court met pursuant to adjournment, the same parties appearing on either side.

The defendants offer in evidence a deed from the plaintiff, Hegler, to William Wilkinson, dated February 6th, 1860, for 100 acres. Received without objection, and the same is hereto attached, marked Exhibit N, and made a part hereof, page 43, this bill.

The defendants offer in evidence the deposition of Daniel Vanderslice, residing in Doniphan county, Kansas, taken the 30th day of May, 1872, hereto attached, marked O, and made part hereof, page 44, this bill.

The plaintiff objects to the answer to the question asking what the witness knew about George Washington selling his land to Houston Nuckols in April, 1859, as immaterial and not responsive. Sustained. Defendants except.

The plaintiff objects to that portion of the testimony contained in the deposition where he refers to the age of the boy as somewhere about fifteen or sixteen years old as immaterial. Overruled. Plaintiff excepts.

The plaintiff offers in evidence the deposition of Samuel M. Irwin, of the same place of the last witness, Doniphan county, Kansas, page 44, this bill.

The plaintiff objects to that portion of the deposition where he refers to the age of George Washington at the time on the ground

that the witness cannot give his convictions, and immaterial. Overruled. Plaintiff excepts.

The defendants offer in evidence the deposition of Major Daniel Vanderslice, taken in 1875. This is the second deposition of this witness, taken in Doniphan, Kansas; the other is dated the 10th day of May, 1872, hereto annexed and marked P and made part hereof, page 45, this bill.

23 The plaintiff objects to that portion of the deposition where reference is made to the sale of said land by said Washington in 1859 as immaterial. Sustained. Defendants except.

J. H. BROADY, on behalf of plaintiff, testified:

I am J. H. Broady referred to in the deposition of Mr. Hegler; remember receiving a package of documents of title; could not say what deeds they were. They were the deeds he refers to in his deposition—part of his chain of title. I could not say what deeds.

WITNESS: I have here a paper; cannot say from recollection whether the original, of which this purports to be a copy, was there or not; cannot say whether the instruments in the package made a complete chain of title or not. I have the impression on my mind that it showed the title. The instruments sent us by Mr. Hegler are lost; have searched for them many times before this cause was tried—the first time. I was one of the attorneys; searched for them everywhere; am thoroughly satisfied they are lost.

Cross-exm.:

My recollection is they came from Mr. Hegler in an express package with some depositions; do not remember what Mr. Stark says (about their being attached to his deposition). They came from Cincinnati in a big envelope, and the depositions around them, I think; do not remember what Mr. Stark says in his depositions about my having advised him that I had placed these deeds in the clerk's office, Falls City, and that they were lost. I cannot imagine why I should have placed them in the clerk's office of Richardson county if I had told him I had done so. I do not remember telling Mr. Stark that that was done. My recollection is that at some time the deeds were conveyed in some package with depositions sent from Cincinnati to us, improperly, as we thought, and we sent them down to Falls City, and I have an impression that we might have sent the deed there at the same time through some mistake.

24 I might possibly have said so; I had that impression at one time. I have examined the files of district court, Richardson county; found some things there. Mr. Thomas was in partnership with me then; think Mr. Thomas has not got the deeds. He was senior member of our firm. It is possible, but not probable, that he has the deeds; cannot say from memory how many deeds there were; more than one; three or four, perhaps more; don't remember how many papers. It seems to me the deeds and depositions were in one package; I have that impression on my memory. I

am a lawyer; presume I knew better then than now what I received. Have been fighting this case twelve years. I kept them all in a package, and think I carried it to Falls City and left it somewhere—forgot it—and that was the way they got lost, I have concluded; discovered the loss about the time the case was tried the first time.

It is not a fact that I did not have any of the deeds before Mr. Stark discovered that the description was incorrect in the deeds. I think they were lost before we found any difficulty in that description; then we began to surmise the discrepancy; we discovered the loss after that. It is a long time before I noticed anything about the description; think it was one time going out of Omaha. I do not think Mr. Stark wrote me first about that. I think you (defendant Schoenheit) wrote first about that. I have no recollection what Stark wrote me the 20th of August, 1875; remember he sent me some papers and wanted of me a tracing, but think all those letters were in response to letters from me. I think the time I discovered the loss of the deeds was at the first trial before Judge Gantt, in district court, Richardson county, and started into the trial the second time and dismissed without prejudice. The present is a second action. My recollection is that we discovered the loss in the first trial, and that we stipulated something in reference to George Washington, when Gantt was on the bench, in '72 or '73, before
25 the case went to the Federal court. My recollection is that I first knew of mistake in the description when the case was in the Federal court; remember of going to Omaha for purpose of trying the case, the former action between these same parties, and that I discovered the mistake in reading over the transcripts from the records; did not ascertain it from the original deed; do not know whether I ever read the original deed or not; could not say from recollection whether I examined the original deeds or not or looked to their acknowledgment to see that they were properly acknowledged; do not remember any mistake in the execution of the deeds or whether they were acknowledged; could not say how much I examined them; have a strong impression upon my mind I saw they were deeds relating to Mr. Hegler's title to the lands in controversy; could not fix the year that I ascertained the defect of the record. According to my recollection it was some time after the cause was removed to the Federal court and before we commenced the last trial before the dismissal; have forgotten whether it was in 1872 or not or when it was removed; think the case had been in the Federal court a year or two. It was while Judge Gantt was on the bench; my impression is during his first term; think the case was commenced in his first term. My recollection is that I got the package about the time of the first transmission of the first depositions before the first trial of the case, about 1870, I should judge; think it was with the same express package that contained the depositions filed November 19th, 1870; do not remember anything after that, when they were lost nor how many nor which ones of the deeds.

Redirect:

The deeds were missed before Mr. Thomas and myself dissolved partnership. We looked for them, could not find them, and have never since found them.

26 The plaintiff offers in evidence the deposition of J. D. Hegler.

The same is objected to so far as it refers to the allotment as irrelevant. Overruled. Which is hereto annexed, marked Q, and made part hereof, attached, page 33, this bill.

The plaintiff offers in evidence the deposition of Wm. M. Stark, taken November 8, 1870, which is hereto annexed, marked R, and made part hereof, page 34, this bill.

The second question is objected to as irrelevant. Sustained. Defendant excepts. Page 34, this bill.

The third question is objected to as irrelevant. Overruled. Defendant excepts as to the first part.

The latter part of the third question is objected to—irrelevant. Sustained as to that portion relating to the officer of the Government taking the censes. The court ruled that that census could not bind anybody as to his age unless the age was given by himself; then it would be a declaration by the party.

Question 4 is objected to. No ruling.

The plaintiff offers in evidence the exhibits attached to and part of —, page 35, this bill; the certificate of allotment and original census list.

Objected to as irrelevant; that it does not state that it is the voluntary act and deed of the party signing it; that the certificate of acknowledgment is defective, invalid, and void; that it is an unofficial document and nothing to give it authenticity in the court of law; it does not purport to be from the office of the officer of the Interior; anything that is of record that is of any value cannot go out.

Mr. WEBSTER: The official list is offered.

Mr. SCHOENHEIT: It is not certified to and we object to it; it does not show any authenticity of any kind; immaterial and irrelevant.

Sustained. Plaintiff excepts. Copy annexed, marked S, page thirty-five, this bill.

Mr. WEBSTER: The exclusion of it is not because it is not sufficiently authenticated, but that it is immaterial paper.

27 The COURT: Yes; the plaintiff excepts.

Which is hereto annexed and made part hereof, marked ex's, page 36, this bill.

The plaintiff offers in evidence a certified copy of the deed from George Washington to Houston Nuckols.

Objected to on the ground that the loss of the original is not accounted for. (Same annexed, marked Exhibit E, above, and made part hereof. See page 27, this bill.)

E. W. THOMAS, on behalf of the plaintiff, testified:

I was one of the firm of Thomas and Broady, counsel for Hegler; remember receiving a package of deeds and documents of title from Cincinnati; they are not in my possession or under my control; know they were sent to the office of the clerk of district court at Falls City; that is the last I saw of them; my recollection is the deeds and depositions were received at my office by express and were sent down to Falls City or taken to the office of the clerk of the district court; the deeds and depositions were in the same paper; I think, were attached to the depositions; not quite certain about that. Subsequently I examined the files in the clerk's office at Falls City; could not find them. Mr. Broady examined and he could not find them; the clerk could not find them; have never *never* seen them since.

Cross-ex'n:

Am not certain that the deeds were attached to the depositions; think they were; do not remember the object of filing the deeds in the clerk's office; my recollection is that it was because they were attached to the depositions; am not certain about that; can't give exactly the date of receipt of the deeds; may have been in 1870 or '71; do not know whether they were with the first or second batch of depositions; do not remember what Mr. Stark swore to in his depositions; it is so long ago I do not remember his testimony, so do not know as I would remember the first deposition if I should see it. (Handed a set of depositions.) I do not remember
28 whether these are the first or second depositions, and have not examined these for years; cannot state how many deeds there were; think the deeds were in the same package with the depositions, and, if I am not mistaken, they were attached. If I remember, Mr. Broady and I read them over; do not remember whether they were a part of the depositions; it is so long ago and I have not thought of it since; do not think he would have put the deeds in the clerk's office if they had not been attached to the depositions; cannot identify any particular deed as in the package, nor the name of grantor or grantee in any of the deeds, nor how many there were, nor whether there were any exhibits with the first depositions or not; do not think that if they were not attached to the depositions nor referred to in them that I would have filed them in the clerk's office, but have no recollection about that; do not know that it would have been wrong to have filed them in the clerk's office if they were not exhibits to the depositions; my recollection is that Mr. Broady and I both examined into the clerk's office at Falls City many years ago and could not find them; think Mr. Broady did most of the work in reference to the matter; think Mr. Broady and I dissolved partnership about 1875 or '76; remember we were in partnership and dissolved amicably, but cannot give the exact date.

Plaintiff offers in evidence copy of a deed of George Washington to Houston Nuckols.

Defendants object that loss of the original is not sufficiently accounted for, and Charles F. Walters is not a justice of the peace. Overruled. Defendants except.

Deed hereto attached, marked "Exhibit E," page 27, this bill.

The plaintiff offers in evidence the second deposition of Wm. M. Stark, hereto annexed, marked Exhibit F, and made part hereof.

The 4th question is objected to as not the best evidence.

The COURT: I think there is evidence enough to justify them in showing what the deeds were; I think there is some testimony
29 that accounts for the absence of the original. I think that they have a right to show the contents if they can prove the execution of the deed, what it contains; they have a right to do that, and if they cannot do that they must fail.

Exhibit A, in connection with this deposition, is offered in evidence, objection to which is reserved until all the deeds are in. The defendants ask at the close of the reading of the deposition that all the testimony that had just been read from the deposition be excluded from the jury; that relates to the deed from Nuckols to Ballard as incompetent to prove the execution of the deed, or that any deed was ever made by Nuckols to Ballard. Overruled.

The plaintiff offers in evidence the deed from Muckols to Ballard.

Objection reserved until all the deeds are offered; attached to deposition as Exhibit B to dep. F and part thereof (page 27, this bill).

The plaintiff offers in evidence the deposition of J. D. Hegler.

The second deposition received without objection, and the same is hereto attached, marked Exhibit T, and made a part hereof, page 37, this bill.

The plaintiff offers in evidence the deposition of L. A. Ryan, of Falls City, Nebraska.

The defendant- objects to the memorandum in the caption of the deed that was put there by the recorder as no part of the deed. Overruled.

The deed is hereto attached, marked Exhibit N, and made part hereof (37, this bill).

The plaintiff offers in evidence the deposition of Charles F. Walther. Received, and the same is hereto attached, marked Exhibit N 2 (page 38, this bill).

The plaintiff offers in evidence the deposition of Mr. Stark, taken on the 8th day of November, 1870, hereto attached, marked R, and made part hereof (page 34, this bill), to which he attaches the original census list. Objected to. Sustained.

The plaintiff offers in evidence Exhibits "A, B, and C" to
30 the deposition, being the deed from Nuckols to Ballard, from Ballard to McMillan, and from McMillan to Hegler; parts of said exhibit (pages 30 & 31, this bill); also the answer of the defendants, filed in the State court December 29th, 1871; a certified copy of the answer in this same controversy, dated December 29th, 1871, which is hereto annexed, marked W, and made part hereof (47, this bill); also the tax receipts for the payment of taxes by

Hegler and his grantors previous to him on this land for the years 1863, 1864, 1865, 1866, and 1868, 1867 being absent, hereto annexed, marked X 1, 2, 3, 4, & 5. Received, and the same are hereto attached, marked Exhibits A, B, C to def'ts', Nov. 8, '70; W, X 1, X 2, X 3, X 4, X 5, and made parts hereof (page 39, this bill).

The plaintiff offers in evidence the deposition of W. R. Kane upon the rental value, and it is agreed that C. H. Jeffery, Henry C. Smith, E. C. Nutter, Henry C. Shrader, and E. E. Metz will testify the same as Mr. Kane. The depositions are hereto attached, marked Exhibit Y (page 39, this bill).

Here the court adjourned until to-morrow morning at 10 a. m.

LINCOLN, NEBRASKA, *January 9th*, 1885.

Tne court met pursuant to adjournment, the same parties appearing on either side, and the following proceedings were had:

The answer above referred to is objected to.

The plaintiff states that he offers to show that defendants purchased subsequent to the claim of Hegler, so that the defects in the deeds clear down to Hegler would not figure, provided that they were good between the parties, and also that there is an admission in there that the deeds are admitted to have been made clear down to Hegler.

Objection sustained. Plaintiff excepts. Exhibit W above (47, this bill).

The plaintiff offers in evidence section- 42 and 43 of the acts of 1856 of the Territory of Nebraska, at page 165. Received. A copy of same is hereto attached, marked Exhibit "Z" (page 48, this bill).

31 The plaintiff asks, for another purpose, that the original census list be admitted, because of further examination it is found that there are two George Washingtons on the list; that Mr. Vanderslice says that this list was approved by him and sent to Washington, and yet he says that he did not know of but one George Washington; that there appears to be two George Washingtons, one about the age contended by them and the other by us.

Objected to as immaterial. Overruled. Defendants except; which is annexed hereto, part of the deposition of Stark, Exhibit S (page 35, this bill).

The plaintiff offers in evidence a copy of a deed from Nuckols to Ballard.

The defendant- makes the same objection to this deed as to the others. The one from Nuckols to Ballard has no description in it, and it appears to have been executed three days before the allotment was made.

The COURT: I will hold that if the grantor had no title at all at the time of the conveyance and he afterwards procured a title that would inure to the benefit of the grantee, it would be immaterial whether he had a title or not if he afterwards acquired it.

The defendant- further objects to all these deeds on the ground that there is no sufficient foundation laid for the introduction of anything but the original. Overruled. Defendant- excepts.

The defendant- objects to the deed from Ballard to McMillan, that it is defective for the reason that it was not entitled to be recorded in the office of the clerk for the reason that the certificate of the justice of the peace does not certify that the deed was executed according to laws of the State of Ohio, and this paper that they produced is simply a blank piece of paper. The only evidence of that deed is the evidence of this man Stark, who says that it was done in his office, and that these witnesses are all dead (page 30, this bill).

The deed from McMillen to Hegler is defective for the reason that it is not properly recorded; that it was not entitled for record
32 and cannot be introduced in evidence at all; that the attesting witnesses are not accounted for, and they do not even name the witness to the deed. Overruled. Defendant- excepts. (G 31, this bill.)

With this the plaintiff rests, and no further or additional evidence *being* offered by either side.

C. A. POTTER, *Reporter.*

"A." Instructions.

Abstract.

DEP'T INTERIOR,
OFFICE OF INDIAN AFFAIRS, *May* 14, 1856.

To Joseph L. Sharp:

1st. Sets forth, 10th, that by the 10th article, treaty Prairie du Chien, July 15, 1830, reservation between the Nemaha river was granted to half-breeds of Iowa, Omaha, and other tribes of Indians.

2nd. By the 5th, 4th, of act of Congress of July 31st, 1854, for making appropriations for Indian Department and fulfilling treaty stipulations, the President is authorized to cause to be fulfilled the above treaty stipulations by causing the reserved tracts to be surveyed and allotted to the proper persons in fee simple.

3rd. To enable the President to comply with the act it is necessary to ascertain the number and names of the half-breeds and mixed bloods entitled to participate. You (Sharp) have been appointed commissioner to act under — following instructions:

To give notice for all persons interested to appear before you with their applications and evidence.

Before commencing to take testimony consult with the Indian agents and chiefs of the tribes.

In making report have regard not merely to proof applicants may submit, but also to information for above mentioned and other sources you consider reliable. You will be furnished by the superintendent of Indian affairs at St. Louis with all the information
33 he may discover bearing on the subject.

I direct that you prepare your report in full to embrace a list containing names of all applicants arranged by tribes a-d fami-

lies and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards, and such other facts as you consider useful and proper. In every case, whether admitted or rejected, give briefly your reasons. Transmit your report, with evidence taken, to this office without delay. The several Indian agents for the particular tribes will be instructed to render you all proper assistance in the premises. Before commencing your duties take and subscribe an oath of office before some officer authorized to administer oaths that you will support the Constitution of the United States and faithfully discharge your duties as such commissioner, which transmit to this office.

GEO. W. MANYPENNY, *Com.*

Authentication under seal Indian Dept., July 17th, 1876, as true copy.

ZECHARIAH CHANDLER,
Sec'l'y Interior.

"B."

Abstract certificate of allotment (copy from deed record), date-April 15th, 1859, to George Washington, half breed, of Iowa tribe, 320 acres, under treaty and act of Congress (above mentioned), known in Government surveys as north half sect. 8, township 2 north, range 17 east.

WM. M. SHARP,
Special Agent.

(B 2 D.)

Assignment written upon above certificate of allotment by George Washington, "to whom within certificate was issued," to Houston Nuckolls and his heirs forever the land herein described, and authorized him to receive patent therefor.

In presence of 2 witnesses.

his
GEORGE x WASHINGTON.
mark.

Acknowledged before Justice of the Peace Charles F. Wal-
34 ther, Richardson Co., Nebr., Apr. 16, 1859. Regular, except the word "voluntary," act and deed is omitted, being acknowledged as "his act and deed." Duly certified as true copy from Book F, page 35, miscellaneous record of county clerk's office, by Ruel Nims, Co. cl'k, under seal April 12, 1876.

Excluded. Plaintiff excepts.

"C." *Patent.*

United States to George Washington, his heirs and assigns forever, north ½ sec. 8, T. 2 N., R. 17 east, 6th P. M., Sept. 10, 1860, by President James Buchanan.

Duly authenticated copy, May 1st, 1872.

WILLIS DRUMMOND,
Com. General Land Office.

(Copy.)

"*E.*" *Deed.*

George Washington to Huston Nuckolls, same lands; consideration, $600.00; in fee simple; covenant of warranty of title. April 16, 1859, regular in form, and execution acknowledged April 16, 1859, before Chs. F. Walther, justice of peace, Richardson Co., Nebr.; recorded April 25th, 1859, Book "E," page 333, deeds record Richardson Co., Nebr.; copy certified by county clerk Richardson county, Nebr., Apr. 23, 1875. The acknowledgment contained these words beyond the ordinary words of such certificate, viz.: "I further state that I am twenty-one years of age."

"F."

Deposition Wm. M. Stark, taken — Cincinnati, Ohio, Sept. 20th to 22nd, 1875, before Chas. F. Seybold, notary public, Hamilton Co., Ohio, in this cause, formal parts and notice omitted, and reduced to narrative form as follows:

1. My name is William M. Stark; age, 56; reside — Cincinnati, Ohio.

2. Am same Wm. M. Stark who formally gave deposition in this cause in State court October or November, '70, and again April 26 and 27, '72.

35 3. Am acquainted with north half section 8, t'p 2 N., of range 17 E., 6th P. M., Richardson county, as special commissioner appointed by Commissioner of Indian Affairs for half-breed reservation between the Nemaha rivers, in Nebraska. I allotted said land to George Washington, mixed blood, Iowa tribe, and delivered to him in person on the reservation my certificate of such allotment, signed by me as such special agent. I am enabled to testify explicitly to this fact from a copy of the census list delivered to me by the Com. of Indian Affairs containing a list of mixed bloods entitled to participated in the allotment of land between said rivers. Such census list I now hold in my hand, dated Office of Indian Affairs, Feb'y 4th, 1858. On the census list is written in my hand: "Allotted to George Washington, mixed blood, Iowa, north half section 8, range 17 east, to 6th P. M., 320 acres," copy of which I have attached as a part of this my deposition.

4. I remember a deed of conveyance from Houston Nuckalls to A. S. Ballard, then of Aspinwall, Nebr. It was signed and sealed by Houston Nuckolls and Mary, his wife, acknowledged before a justice of the peace, Richardson county, Nebr., April, 1859. It conveyed to A. S. Ballard the north half of said section 8 and north half of sec. 9, in same township. This deed, with others belonging to Ballard, was in my possession for some time in fall of 1859, at my office, Xenia, Ohio. It and other exhibits with my first depositions was forwarded to Thomas and Broady, attorneys-at-law, Brownsville, Nebr., and, as I am informed and believe, delivered to the clerk of the court, Richardson Co., Nebr., and afterwards lost or stolen.

5. I am able to give description of the land contained in and conveyed by said deed from them having made a copy of the description of the land conveyed by said deed while it was in my possession. The description was the north half of section 8 and
36 the north half of section 9, all in T. 2 north, of range 17 east, of sixth principal meridian. A number of other deeds from Nuckolls to Ballard were then in my possession, and I copied from the deeds description of the lands conveyed and compared descriptions with my record of attachments and found the descriptions correct. Nuckolls purchased of George Washington, mixed Iowa, the north ½ of sect. 8, t'p 2 N., of range 17 E., and of Now-to-che-chin, ¾ blood Iowa, the north ½ of sec. 9, same township.

6. This paper (Ex. A, this dep.) is not a correct copy of the deed of Nuckolls to Ballard, formally in my possession, in this: that the word two, between the words "township" and "north," is omitted. With the word two inserted between "township" and "north" it would be a correct copy of that deed.

7. It fails to be a correct copy because the word two is omitted between the words township and north. If the original deed had been correctly recorded the word two would have been there between "township" and "north," as it was in the original which was in my possession, forwarded, with other deeds and papers, with my first deposition mentioned. If the word two was inserted between "township" and "north" in description of the land, then Ex. A would be a correct copy of the description of land in the original deed from H. and Molly Nuckolls to A. S. Ballard.

8. George Washington, mixed Iowa, had possession of said land from date of allotment (Apr. 15, '59) till he sold to Nuckolls, Apr. 16th, '59. Ballard purchased the land of Nuckolls Apr. 20, '59; sold and conveyed the same to James McMillen Sept. 16th, '59, and said McMillan sold and conveyed the same north half of sec. 8, t'p 2 north, of range 17 east, of 6th P. M., to J. D. Hegler Oct. 13, '69, who took and held possession and paid taxes on said land until defendants claimed and took possession. The deed of Ballard and wife to McMillen conveying the north half of sec. 8 was writ-
37 ten in my office, at Xenia, Ohio, in my presence, about Sept. 1st, '59. Ballard wrote the deed and copied the description of the land from the deed of H. and Molly Nuckolls to Ballard. After the deed was written I held Ballard's deed to McMillan, and, Ballard reading from Nuckolls' deed, we compared description of the land, to wit, the north half of section 8, town 2 north, of range 17, and found it was correctly copied. Ballard then took the deed to his residence, Jamestown, Green county, Ohio, and Sept. 10th, '59, acknowledged it before John D. Johnson, justice of the peace, Green Co., Ohio, witnessed by said justice of the peace, Johnson, and James Hibben. All of Ballard's deeds remained in my possession for some time afterwards. In winter of '59–'60 Ballard delivered the deed, properly acknowledged, to McMillan, in my presence and in my office. In the latter part of Sept., '59, I directed McMillan to take the deed to John Boyd, clerk of court of common pleas, Green county, Ohio, and — certify John D. Johnson was an acting justice

of the peace of Green county at the time of taking the acknowledgment of said deed before sending it to Nebraska for record.

9. Said John D. Johnson, the justice of the peace, and James Hibben, the subscribing witness and officer before whom the acknowledgment was taken, are both dead. John Boyd, clerk of the court, Green county, O., who certified John D. Johnson's official character, and Alexander S. Ballard, who made the deed, and James McMillan, who received it, are all dead. Mrs. Mary Jane Ballard, widow of A. S. Ballard, is living in Jamestown, Green Co., Ohio.

(Signed) WM. M. STARK.

EXHIBIT "A," ABOVE DEPOSITION.

Warranty Deed, N. ½ Sec. 8 & N. ½ Sec. 9, T. 2, R. 17. Filed for Record May 24, 1859.

H. Nuckolls and wife to A. S. Ballard.

Know all men, &c., H. Nuckalls and Mollie Nuckalls, for
38 consideration of $1,200, acknowledge, sell, and convey to Alexander S. Ballard, his heirs, north half of section eight and north half of section nine, all in township — north, of range seventeen east, of 6th P. M. (with special warranty).

Dated 20th day of April, 1859.

Witnessed, to wit, acknowledged, Richardson county, Nebr., Apr. 20th, 1859, before justice of the peace in due form.

Above copy certified from Book "E," page 383, deeds; recorded, Richardson Co., Nebr., by L. A. Ryan, Co. clerk, Apr. 23, '75.

EXHIBIT "B" TO ABOVE DEPOSITION.

Warranty Deed. Filed for Record Feb'y 8, 1860.

A. S. Ballard to James McMillen.

Alexander S. and Mary Jane Ballard, his wife, in consideration — $1,000.00, to James McMillan, his heirs, &c., the north half of section 8, township 2 north, of range 17, Richardson Co., Nebr., 320 acres. (Special warranty.)

Dated Sept. 16, 1859.

ALEXANDER S. BALLARD.
MARY JANE BALLARD.

Witnesses:
JAMES HIBBENS.
JOHN D. JOHNSON.

Acknowledgment, Green County, Ohio.

Before John D. Johnson, justice of the peace, said county, personally appeared Alexander S. Ballard and Mary Jane Ballard — acknowledged the signing and sealing of the above conveyance to be their voluntary act and deed, &c.

Apr. 16, 1869.

JOHN D. JOHNSON, *J. P.*

GREEN COUNTY, OHIO, *Oct.* 14, '59.

John Boyd, clerk court common pleas, said county, certifies official character of J. D. J., acting justice of the peace of said county, &c., at above date and genuineness of his signature.

[SEAL.] JOHN BOYD, *Clerk.*

39 Above copy duly certified from Book 1, page 194, deeds, Richardson Co., Nebr., April 23, 1875, by L. A. Ryan, Co. clerk said Co.

EXHIBIT C, ABOVE DEPOSITION.

OFFICE OF INDIAN AFFAIRS, *Feb'y* 4, 1858.

A list containing the names of half-breeds who, upon testimony presented to this office, are entitled to participate in the allotment or assignment of lands within the reservation between the Nemahaws.

Name.	Family.	Sex.	Age.	Degree.	Band.	Rem.
Lag-gar-ash	Father	Male.	55	¾	Iowa	
George Washington	Son	Male.	20	Mixed.	"	
George Washington		Male.	10	½	Omaha	No land allotted on cash list.

"G."

Warranty Deed. Filed for Record Feb. 8, 1860.

James and Malinda McMillan to J. Dice Hegler.

James McMillan and wife, Malinda, Xenia, Ohio, in consideration of $1,000 paid by J. Dice Hegler, bargained, &c., and convey- to J. Dice Hegler, his heir-, all real estate in Richardson Co., Nebr., described as north half of section 8, t'p 2 north, range 17, 320 acres, special warranty, dated 13th Oct., 1859, signed by grantors in presence of two witnesses; acknowledged — Green county, Ohio, before James Kyle, justice of peace, in due form, Oct. 18th, 1859; certified, Green county, Ohio, Oct. 14, 1859, by John Boyd, clerk common pleas court, to official character of James Kyle and genuineness of his signature.

Copy certified from page 195, Book I, deeds, Richardson Co., by L. A. Ryan, Co. clerk, Apr. 23, 1875.

"Q."

Depositions, Formal Parts and Questions Omitted, Taken Sept. 20–22, 1875.

J. D. Hegler is my name; age, 40; residence, Hamilton Co., Ohio; formally gave deposition in this case in State court; am ac-
40 quainted with the north half section 8, t'p 2 N., of R. 17 E., Richardson county, Nebr. Of the execution of a deed —

Houston Nuckolls to Ballard I only know that Ballard had a deed from Nuckolls and his wife; had it in my possession, and think it was sent with the first deposition of W. M. Stark to Thomas and Broady, Brownville, Neb., and am informed and believe that the deed, with other papers, was lost or stolen. I was present when the deed from Ballard and wife to McMillen was written, and saw Ballard copying the description of land from the deed of Nuckolls to himself, and heard Ballard and W. M. Stark comparing the description of the land in his deed to McMillan with that in his deed from Nuckolls; do not remember the description as compared; did not note it particularly. I do not know who had possession of said land prior to Oct. 13, '59. From that time I held possession and paid the taxes till defendants took possession. Of the parties and subscribing witnesses to the deed of Ballard to McMillan, Ballard, the grantor; Hebber, the witness; Johnson, the justice, and Boyd, the clerk who certified, are all dead. Mrs. Ballard lives at Jamestown, Green Co., Ohio. The original deeds constituting my chain of title were all in my possession, viz: The certificate of allotment of N. ½ of section 8, t'p 2 N., of R. 17 E., to George Washington, 320 acres; the deed from him to Houston Nuckolls; the deed from Nuckolls and wife to Ballard; the deed from Ballard and wife to McMillan; the deed from McMillan and wife to me. These were all expressed with Wm. M. Stark's first deposition in State court to Thomas and Broady, attorneys-at-law, Brownville, Nebr., who informed me they had received them, and that all said papers were lost or stolen.

"R."

Depositions Taken Nov. 8, 1870, *Wm. M. Stark, Formal Part- Omitted.*

41 1. William M. Stark is my name; age, 53 years; residence, Cincinnati, Hamilton county, Ohio.

2. July 8, 1859, I was special agent of the Indian department of the United States to assign or allot lands in the half-breed Indian reservation, between the Great and Little Nemaha rivers, in Nebraska, for the benefit of such half-breed and mixed-blood Indians entitled to the same under the 10th article of the treaty of Prairie du Chien of July 15th, 1830. I was appointed Aug. 4th, 1857, by Hon. J. W. Denver, Com. of Indian Affairs, and continued to be such special agent until the middle of July, 1859, when I made my final report and all my papers to the Com. of Indian Affairs at Washington, including all certificates of allotments to the half-breeds or mixed-blood Indians which had not been delivered to the parties entitled, who had failed to appear and be identified and receive certificates.

3. I know all about the allotment of land between Nemahas on the half-breed reserve in Nebraska to the mixed-blood Indians; was the special agent to make the allotments and deliver all the certificates of allotments that were delivered on the ground.

4. I know the north half of section 8, T. 2 north, of R. 17 E., in Richardson county, Nebr., in the half-breed tract, was allotted to

George Washington, of mixed blood, Iowa tribe, and certificate therefor was delivered by me to him in person April 15th, 1859. I should judge him to be more than 21 years of age from his appearance. (The following excluded on def'ts' objection. Pl'ff excepted.) I also judge that he was more than 21 years old at that time from official list containing the names of half-breeds, who, upon testimony presented to the office in Washington, were regarded as entitled to participate in the allotment of lands within the reservation between the Nemahas, which list is dated Feb'y 4th, 1858, and shows that George Washington was at that time twenty years of age. I saw him frequently afterwards, and am satisfied in my own
42 mind that he was between twenty-two and twenty-three years of age when he received the certificate for the land above described.

5. The list here (annexed Exhibit A) is the list sent me from the Indian department, dated Feb. 4th, 1858, containing the names of half-breeds entitled to allotment of land in the reservation between the two Nemahas. I received this list by due course of mail and acknowledged its receipt Feb'y 14, 1858. The George Washington whose name appears on the list as male, 10, ½ Omaha, never received any allotment of land in said reservation. I attach the paper marked "Ex. A" to this my deposition as a part thereof.

6. George Washington, to whom said land above described was allotted and to whom I delivered the certificate for the same, was of mixed Indian blood and of the Iowa tribe, son of Lag-gar-ash, on the attached list as 55 years of age, ¾ degree of blood Iowa.

7. The annexed paper, Exhibit B, is the certificate of allotment delivered by me to George Washington, a half-breed or mixed blood of Iowa tribe, on April 15, 1859, to which my signature is signed by me in my own proper hand as special agent. He is the same George Washington to whom I have referred in my answer above who was entitled to the land above described in said certificate. I attach the paper marked "Ex. C" to this my deposition as a part thereof.

Exhibit A to above deposition offered and excluded. Pl'ff excepted.

"S."

OFFICE OF INDIAN AFFAIRS, *Feb.* 4, 1858.

A list containing the names of half-breeds who, upon testimony presented to this office, are regarded as entitled to participate in the allotments or assignments of lands within the reservation between the two Nemahas.

Name. 43	Family or single.	Sex.	Age.	Degree of blood.	Band.	Remarks.
Lag-gar-rash	Father	Male	55	¾	Iowa	
George Washington	Son	Male	20	Mixed.	Iowa	
Elizabeth Rogers	Family	Female	38	½	Omaha	Elizabeth Roger on original bill, page 10.
George Washington		Male	10	½	Omaha	

EXHIBIT B TO ABOVE DEPOSITION.

4, 283.

Original allotment certificate, date 15 April, 1859, to George Washington, mixed blood, of the Iowa tribe, 320 acres, viz: North half of section 8, township 2 north, range 17 east.

WM. M. STARK,
Special Agent.

On back of same as follows:

For value received I, George Washington, to whom the within certificate of allotment of half-breed land was issued, do hereby sell, assign, transfer, and convey unto Houston Nuckolls, his heirs and assigns forever, the within certificate and the land therein described and authorize him to receive the patent therefor.

Given under my hand and seal this 16th day of Apr., 1859.

his
GEORGE x WASHINGTON.
mark.

WM. T. NORRIS.
WM. K. CAIN.

TERRITORY OF NEBRASKA, }
County of Richardson. }

Before the undersigned, a justice of the peace within and for Richardson county aforesaid, appeared George Washington, who is personally known to the undersigned to be the identical person whose name is subscribed to the foregoing assignment, and acknowledged the same to be his act and deed.

CHARLES F. WALTHER,
Justice of the Peace.

St. Stephen's, Apr. 15, 1859.

"T."

Deposition, Formal Part Omitted, Taken July 2, 1873.

J. D. Hegler is my name; age, 37; reside, Cincinnati, Ohio; plaintiff in this action. The deed from George Washington to Houston Nuckolls and also the deed from Nuckolls to Ballard, also the
44 deed from Ballard to McMillen and the deed from McMillen to myself, each of which conveyed the land in controversy, forming the chain of title I had in my possession from the time I purchased said lands from McMillan in 1859 till about the 8th of November, 1870, when I sent them by express to Thomas and Broady, my attorneys, Brownsville, Nebr., and I have not since seen or had possession of them or either of them since.

"U."

Deposition of L. A. Ryan, Formal Parts Omitted, Taken Sept. 20, 1875.

L. A. Ryan is my name; age, 34 years; residence, Falls City, Nebr.; county clerk and register of deeds, Richardson county, Nebr. This paper, Exhibit "A," attached to this deposition, is a correct transcript from the deeds of record of Richardson county, Nebr. I have looked at and examined the original record, from which Exhibit A, attached, is copied, and cannot say whether the omission of the number of the township, omitted in the description in the body of the deed, was an error in the recording or not. There appears to be no space left for the omission if it were in the original deed. I can give a fac-simile copy of the caption and first two lines and the description of the land taken on tracing paper from the deed record, of which Exhibit "A" is a copy, which I have made on tracing paper and here hand the commissioner, attached, Exhibit "B."

Mr. William H. Mann, the recorder, who recorded this deed, — accustomed to note on the record such omissions, defects, and mistakes in deeds, but I have found many which he had not noted.

No such note or memorandum of the records appears on the record of which Exhibit A is a transcript.

Cross-exm.:

The "caption" of the deed, as I have termed it, is a memorandum made on the record by the clerk, and is not a part of the deed.

45 U 2.

Deposition, Formal Parts Omitted, — Charles F. Walther, Taken Sept. 20, 1875.

Charles F. Walther is my name; age, 40; resident Richardson Co., Nebr.; am the Chas. F. Walther who took the acknowledgment of George Washington to Houston Nuckolls Apr. 16, 1859. George Washington himself made no representation as to his age; it was the interpreter. Houston Nuckolls requested the interpreter to ask him if he was of age. The interpreter asked him something in Indian, and Lar-gar-rash, George Washington's father, replied in Indian; then the interpreter said it was all right. George Washington appeared to be a tall, grown boy. After the interpreter said "All right" Houston Nuckolls told me to put in the deed the words "I am twenty-one years of age." How it was put in the acknowledgment I cannot explain. The words were intended to refer to George Washington. My mind appears to have been in confusion. I do not know where W. W. Buchanan, witness to the deed, is. The other witness, W. T. Norris, is in Washington Territory or Oregon.

Cross-exm.:

Do not recollect the interpreter; it was either Robert White Cloud, Frank Dupies, or Elijah Deroin. The interpreter was not

sworn. George Washington did not understand the English language. I did not know his age.

(The following words plaintiff objected — as heresay and incompetent—objection overruled, and plaintiff excepted—viz: I understood afterwards that he was between 14 and 16 years of age. George Washington himself made no representations as to his age or said a word. Lag-gar-ash, when the interpreter asked him in regard to his age, answered for him.)

Redirect:

(To plaintiff's counsel:) In saying to you some time ago that George Washington represented himself to be of age at the
46 time of making the deed I had reference to the conversation as given more fully in this testimony. I stated that he was pretty well grown up, and could be taken by a casual observer as of age.

"X."

Tax Receipts, Abstracts, Formal Parts Omitted.

Description of land.

	Sec.	T'p.	R'e.	Year.	Date.	Paid by—	Am't.	Q'g'd by Co. T.
N. half	8	2	17	1863	14 May, 1864.	James D. Hegler.	4 95	F. A. Tisdel, Sr.
N. ¼ & p't of E. ½ of N. W. ¼, with other land.	8	2	17	1864	28 Apr., 1865.	W. G. Mann...	44 39	" "
N. E. ¼ & 60 acres off E. side N. W. ¼, with other land.	8	2	17	1865	30 Apr., 1866.	James D. Hegler.	48 53	D. R. Holt, Tr.
N. E. ¼ & 60 A. off E. side N. W. ¼.	8	2	17	1866	3 May, 1867.	Jas. D. Hegler.	15 67	D. R. Holt, Tr.
N. E. ¼ & 60 acres off E. side N. W. ¼.	8	2	17	1868	21 Apr., 1869.	J. D. Hegler...	29 43	D. R. Holt, Tr.

"Y."

Deposition, Formal Parts Omitted.

William R. Cain is my name; 62 years old; reside — Falls City, Nebr.; farmer; am acquainted with parties to suit for 27 years past; have known the land in controversy since its survey by the Government 25 years ago. The first improvements were put on it in 1870 or '71. Wm. Herd or David Farrington put the first post thereon about 1871. Henry Jeffrey moved on the northeast quarter during 1872, and no one was then living on the other part of land. I think or heard the posts were put on for James Cottier for the fencing of the farm. The first breaking was done in 1871. Henry Jeffrey broke about 40 acres, and some more was done since.
47 The house was built in 1872. The land is now worth $25 per acre without improvements. It would sell for more with the improvements—$30 to $35 per acre with the improvements. It is worth a rent of about $550 per year and has been worth that for a few years back. The average yearly rental for the farm since its improvements first has been $400 or $450.

Agreed. Above is also evidc. of E. E. Metor, Chas. Henry Jeffry, Henry C. Smith, and reading their depositions waived.

"*H.*" *Patent.*

United States to George Washington, his heirs, &c.

North half section 8, t'p 2 north, range 17 east, 6th P. M., Sept. 10, 1860, due form.

"*T.*" *Deed.*

George Washington, — consideration of $500 paid by A. Schoenheit and Ed. S. Towle, conveys to them in fee simple north half sec. 8, t'p 2, range 17 east; covenants gen'l warranty; dated Nov. 3, '66; witnessed. Acknowledged before notary public, Richardson Co., Nebr., Nov. 3, 1860, who certifies, "Personally appeared George Washington, a half-breed Indian, to me well known to be the person named in and who executed the foregoing conveyance and acknowledged the same to be —." Filed for record Dec. 8, 1866. Recorded deed, Record 9, page 133.

"K."

George Washington and wife, Mary Childs (23 and 25 years of age respectively), in consideration of $500 paid by A. Schoenheit and Ed. S. Towle, conveyed to them in fee simple same land, covenants general warranty, dated Feb'y 28th, 1868; two witnesses. Acknowledged Feb'y 28th, 1868, before Joseph Brown, Richardson county, Nebr., who certifies, "Before me personally came George Washington and Mary Childs, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to
48 be their voluntary act and deed. I further certify that I know the grantors above to be the identical persons they represent themselves to be."

"L."

Deposition Elisha Deroin Reduced to Narrative, Formal Parts and Questions Omitted. Taken March 20, 1871.

1. I live on the Iowa reserve, Richardson county, Nebr., and, 2, have since fall of 1854.

3. I belong to the Iowa tribe.

4. Am going on 43 years of age.

5. Since 1861, till last winter, I have been U. S. interpreter for that tribe.

6. The Iowa tribe have lived on that reserve since 1854.

8. I am acquainted with George Washington. He belongs to the Iowa tribe of Indians.

9. His father's name is Lag-gar-ash.

10. I have known George Washington ever since he has been in the tribe.

11. He was born on the old reserve, called the Iowa trust land.

12. He drew lands on the half-breed reserve, between the two Nemahas.

13. I knew of no other George Washington who drew land on the half-breed reservation.

14. Nor have I known of any other Iowa Indians within twenty-five years back by the name of George Washington.

Obj. by pl'ff'- att'y.

15. He is in the neighborhood of 26 years of age.

16. I know nothing of having made a deed to Houston Nuckolls.

17. He has been in full tribal relation to the Iowa tribe and lived with them since 18—. I have known him and have been in charge of the several agents over the tribe.

19. He speaks the Iowa language and understands English a little.

20. Knew of his making a deed to Schoenheit and Towle
49 about three years ago.

Cross-exm.:

I have been with the Iowa tribe since 1837; know the age of George Washington only from my acquaintance with and knowledge of him; first saw him when an infant; there is no record of his age that I know of. I did not keep any account of the years since I saw him a child; we do not keep any account of years of time as they pass. I have known Lag-gar-ash ever since I can recollect anything; that has been his name since 25 years ago last winter; he has only two sons that I know of; George Washington is here present. I do not think he is 30 years of age; he is not 30. I have good idea he is not 30. When he came to the reserve in 1854 he was about the size of a boy 8 or 10 years of age—was between 8 and 10 years of age; his name has been George in the neighborhood of 20 years; when he was at school he drew land because he was a mixed blood; his mother was full-blood Indian; his father, Lag-gar-ash, is a little over half-blood Indian of Iowa tribe, but has some white blood. I know it because he is recommended by a great many of the tribe. I merely knew there was such a man as Houston Nuckolls; do not know what Shoenheit and Towle gave George Washington for the land.

Redirect:

My memory is pretty good generally as to past dates and events. Lag-gar-ash's other son had no name and died in child-birth.

"M."

Lag-gar-ash. Questions and Formal Parts Omitted; Depositions Taken March 20, 1871.

My name is Lag-gar-ash; head chief of Iowa tribe; am about 55 years of age; have one son, George Washington, my only son liv-

ing; he is 26 years old next harvest time, to the best of my
50 knowledge. Major Richardson was U. S. Indian agent when he was born. George Washington drew land as an Iowa mixed blood, but I do not know where it was; he belongs to Iowa tribe. In 1859 he sold his land to Houston Nuckolls, at Cain's store, in St. Stephens; he was then about 12 or 13 years old. The Iowas moved on the reservation in 1854, and he sold his land to Nuckolls about five years after. He did not understand any English when he sold his land to Nuckolls.

Obj.—Immaterial.

Nuckolls paid him $50 in money and a horse he took at $150.00. My son George Washington is present here.

Cross-exm.:

I live on the Iowa reserve, on Kansas side; have had eight sons; only the present one was named George Washington. I only count time by the winters. I knew George Washington drew land. I was myself a mixed blood and knew he drew it.

Q. Mr. Towle and Mr. Schoenheit have talked all these matters over with you, have they not?

Ans. They have told me they were going to get the land back for George.

Q. Have they told you what to swear to get the land back?

Ans. That George was only a boy, and they were to get the land back or a part of it for him; they never told me to swear to anything. I know George Washington sold his land to Nuckolls because he told me, and brought the money and horse. I have been with the Iowa tribe ever since I was born. My age is about 55.

Re-examination:

I had three children before George Washington was born. I saw his patent for the land and saw him give it to Shoenheit and Towle. He received his patent from Major Vanderslice, Indian agent.

Deposition taken March 20, 1871.

51 "N."

Warranty Deed. Filed for Record Feb'y 8, 1860.

J. Dice Hegler to William Wilkinson.

J. Dice Hegler and wife, Mary, in consideration of $300 paid, grant, &c., and convey to William Wilkinson, his heirs, &c., the N. W. ¼ of N. W. ¼, the S. W. ¼ of N. W. ¼, 10 acres off the west side of N. E. ¼ of N. W. ¼, and 10 acres off of west side of S. E. ¼ of N. W. ¼, section 8, t'p 2 N., of range 17 E., Richardson county, Nebr., in fee simple, with general warranty, dated Feb'y 6, 1860, witnessed, acknowledged in due form before a justice of peace, Richardson Co., Nebr. Copy from Book 1, page 197, deed record. Certified Jan'y 1, 1881, by county clerk.

"O."

Deposition, Taken May 30, '72, Formal Parts and Questions Omitted.

Daniel Vanderslice is my name; residence, Doniphan county, Kas.; was agent for Iowa tribe from May, 1853, and have known George Washington nearly all the time since—an Iowa mixed blood; his father was Naggarash, generally known as Leg-gar-ash, and about 55 to 57 years of age. George Washington drew land as a mixed blood. He is not, to the best of my belief and impression, less than 25 years old and not more than 27; there is a record of his age at the agency and at Washington. The supplemental list on which his name appears was presented to me to be examined and reported on in the winter of 1859. I was acquainted with George Washington in April, 1859. He did not understand English, then and we always talked with him through an interpreter. I do not want it understood that he did not understand English at all; I think he did understand me sometimes when I spoke to him in English and my broken way of talking Indian. He was then living on the agency under my charge; he was about 15 or 16 years of age in 1859; he drew his land in Richardson county, Nebraska.

52 2 O.

Samuel M. Irwin is my name; residence, Doniphan county, Kansas; first became acquainted with the Sacs of Mo. in 1837. I was missionary to them from 1837 to 1860. I have been acquainted with the family of Lag-gar-ash since 1839 to identify its members; it was a large and distinguished family. George Washington I am acquainted with; he belonged to the Iowa tribe and family of Lag-gar-ash; have known him since his birth, I suppose, but can't identify him by that name; we always called the children by the Indian name. Major Richardson was agent at the time of his birth, to my best recollection; my conviction is that George Washington was born in 1846, making him now 26. Lag-gar-ash is now 56 or 58. The entire time from 1837 to 1860 I resided at Iowa and Sac Indian mission school.

"P."

Daniel Vanderlice—Deposition Taken Oct. 26, 1875, Questions and Formal Parts Omitted.

My name is Daniel Vanderlice; am in my 77th year; residence, Doniphan county, Kansas; am acquainted with George Washington, of Indian mixed blood, Iowa tribe, son of Nag-gar-ash, commonly called Lag-gar-ash, and have known him since summer of 1853. The father of George Washington being chief of the Iowas and Indian agent, necessitated intercourse between us relative to affairs of the tribe; I became acquainted with his son, who was often with him in my office. I succeeded Maj. W. P. Richardson, the former agent, in May, 1853, and continued to be agent of the tribe

till 1860. From 1853 till 1860 Lag-gar-ash and his son, George Washington, were under my charge as Indian agent; to best of my recollection, George Washington was about 7 years old when I first knew him to identify; him consequently he is now 28 or 29. I am well acquainted with Rev. Samuel M. Irwin and have been since May, 1853; he was missionary, appointed by the American Board of Missions, to the Iowa and Sac tribes, and — charge
53 of the mission school; do not know where Mr. Irwin is; am informed he is on a visit to Pittsburg, Penn. I know of no other George Washington of mixed blood belonging to the Iowa tribe. There was a supplementary list of Indians of mixed blood sent to me by the Commissioner of Indian Affairs for examination and correction, which was reported to that bureau at Washington; it was, I think, in 1859, but cannot recollect; in that list the name of George Washington was included; the list was sent to me for general supervision, to be examined and corrected; there were names on the list whose claims to lands were rejected; the claim of George Washington was approved and a patent issued.

—. Have you any knowledge now of the age of said Washington on that list?

Ans. My recollection is he was about 14 years old; perhaps not over 13 when the list was made out. It was customary to add the age of the claimant as near as it could be approximated, from the best information to be held at the time; they had been often incorrect. If his age was given in that list as older than 14 or 15 it was not correct. I cannot, of my own knowledge, state how long Maj. Richardson was agent of the tribes before I succeeded him; he is now dead. Lands were granted to Washington as a mixed blood—320 acres, but I do not remember description; all I know of the sale by him to Nuckolls I had from Lag-gar-ash, his father, and heard afterwards he had done so; I advised against it, as he was under age, and the land would become more valuable by time he became 21; have before given a deposition in this case.

W.

Abstract of Answer.

District Court, Richardson County, State of Nebraska.

JAMES D. HEGLER
vs.
GEORGE FAULKNER, JAMES COTTIER, AUG. SHOENHEIT, EDWIN S. TOWLE.

54 Defendants deny that plaintiff has a legal estate in fee simple or any other interest in said lands; deny plaintiff is entitled to possession; aver that George Washington, half-breed Iowa Indian, obtained title by patent from United States Sept. 10, 1860, and Feb'y 28, 1868, being full age, by deed duly executed; conveyed the same to Schoenheit and Towle defendants, who deliv-

ered possession and sold by contract said premises to Cottier and Faulkner in good faith, who have in good faith improved — at expense of $2,000; that since filing of petition they have ascertained that plaintiff claims title by a *claim* of pretended conveyances found- on deed records of Richardson county of said premises, viz.: Apr. 16, 1859, from George Washington to Houston Nuckolls, Book E, page 333; Apr. 20, 1859, from said Nuckolls to A. S. Ballard, Book E, page 383; Sept. 16, 1859, from said A. S. Ballard to James McMillen, Book 1, page 194; Oct. 13, 1859, from said McMillan to James D. Hegler; excluded on def'ts' obj.; pl't'ff excepts; which deeds are recorded in the deed books and pages respectively; said deeds are not executed or acknowledged according to law. The officers taking such acknowledgment were not the officers they represent- themselves to be at the times they took the respective acknowledgments. The deeds are not valid as such, and were improperly recorded, and defendants had no actual knowledge of their existence at the times of their respective purchases. Apr. 16, 1859, said Washington was a minor, of the age of 15 years only, and in full tribal relation, living on an Indian reservation, under control of an Indian agent, and said pretended deed was executed on the Indian reservation and acknowledged there before a pre-
55 tended justice of the peace without having jurisdiction. Washington was not then the owner of the premises, and Nuckolls and the plaintiff conspired to cheat and swindle Washington out of the premises, obtained such deed fraudulently, and, to more effectually becloud the title, created the intermediate quitclaim conveyance aforesaid and placed the same on record as aforesaid; that Washington never received any consideration therefor; prayer for quieting of title and for costs.

Z.

Laws — Nebraska Territory in Force April, 1859, *Approved Jan'y* 26, 1856, *Page* 165, *Acts* 1856.

SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money and property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority.

SEC. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting.

Thereupon the parties rested their proofs.

The plaintiff requested of the court the following instructions to the jury, viz:

The jury are instructed that an official census, prepared under the statutes of the United States or official authority of the department of Government, is competent evidence to prove the age of persons

therein enumerated, and if they find that a census of the Indians and persons of mixed blood by the department for its guidance was made and furnished officially by the department to Mr.
56 Stark for his guidance in making allotments, then such list is competent evidence to prove the age of the son of Laggar-ash, George Washington.

Which request the court refused to give to the jury, and to such refusal the plaintiff then and there excepted.

The plaintiff further requested the court to give the jury the following instructions, as set out at lines 25 to 32, inclusive, marked plaintiff's request below.

The Charge of the Court in the Case of Hegler v. Faulkner et al., Delivered January 9th, 1885, in Lincoln, Nebr.

GENTLEMEN OF THE JURY: The plaintiff has sued the defendants to recover the possession of three hundred and twenty acres of land—that is, one-half of section 8, township 2, range 17, in Richardson county, Nebraska.

Now, if the plaintiff is entitled to recover at all, I think I ought to say to you now that under no circumstances can he recover in this action, as the testimony now stands, all of the land that was claimed, for the reason that the testimony conclusively shows that one of the grantors had already conveyed away one hundred acres of the land before the plaintiff in this suit became seized of the land; so under no circumstances would he be entitled to recover it all, though he may be entitled to recover a part, in your opinion. The question of identity and the age of the individual described in the patent is the principal one for consideration. I have been asked by the defendants to state to you the circumstances under which this allotment was made to the half-breed Indians in question, and I think I can explain that so that you may get some little better understanding than you have at the present time from what has been said by counsel on the other side. In 1830 there was a treaty made between several tribes of Indians, known as the Prairie du Chien treaty. That was ratified and became a part of the laws of the land. In that treaty the several Indian tribes represented desired to
57 make some provision for the mixed-bloods belonging to the several tribes, and they had a provision inserted by which the mixed-blood Indians belonging to these tribes were provided for, and a section of land between the Nemahas, running from the Little to the Great Nemaha, ten miles wide on each side, was set apart for the half-breeds of these several tribes who joined in that treaty. Afterwards an act of Congress was passed that required it to be divided up among the half-breed Indians of the several tribes belonging thereto. The tribes named are the Iowas, Yankton, Sontees, the Omahas, and the Saxes, the Foxes, and the Missouri. Those are the Indians that are named there whose half-breeds and mixed-bloods are entitled to participate in the allotment on that particular reservation. An act of Congress was afterwards passed carrying into effect the provisions of this treaty, and required

the census to be taken under the supervision of the Indian Department of the Government, and when the names of the half-breeds were ascertained it was settled by the Interior Department as to what ones were entitled to receive the land; they were to receive not to exceed 320 acres each.

When the proper time came a commissioner was appointed to take a census; that was Mr. Sharp, and he made his report, and his report was imperfect in several instances; some were left off and others were put on the census-roll. A number of efforts were afterwards made and the names of some were placed on that list, and this one among a number that was left off. Testimony was taken and the names placed on the list; he was found entitled to land, and when the allotment was finally made by the agent, Stark, who was appointed for that purpose, then this particular Indian received his allotment the same as the others. That is the manner in which the whole business was transacted, and the way in which this party became entitled to participate in the allotment, he being of
58 the Iowa tribe of Indians and that tribe being represented when treaty was made. George Washington having been found to be entitled to participate in the allotment, he having some white blood in him, was placed upon that list, and in pursuance of the law and the regulation of the department he received his land the same as the others.

The mixed-bloods of the Omahas were also entitled to participate; hence we see the name of one individual called George Washington, who was said to be an Iowa Indian—a son of Lag-gar-ash—and another Indian among the Omahas named George Washington is placed on the list, one belonging to one tribe and another to another. Can there be any doubt as to which Indian, or which half-breed, or which mixed-blood is the one that was intended to receive this land and which did receive it?

I think that the testimony on both sides show that George Washington, the Iowa mixed-blood, was the one that was entitled to receive it and received the three hundred and twenty acres in controversy in this suit.

Then the important question for you to determine is as to the age of George Washington at the time of this allotment and the time of making the alleged transfer from him to Houston Nuckols, under whom this plaintiff claims.

The plaintiff has asked me to give you several instructions. I think they are in the main correct, yet I give them with one slight modification. Now, at the time this conveyance was made it is said that George Washington had no title to this land; that may possibly be true, but my judgment is the other way. If a certificate of allotment was made to him—that is, some title—it is some evidence of title, at any rate, and would be enough to put him in possession and enough to justify him in keeping everybody else out of possession; so that he had a right to the land when the allot-
59 ment was made, and conveyed a right and interest in that land, and, of course, I think he had a right to convey it. I know that there are a diversity of opinions in regard to the right of

an Indian to convey his land; the nature of the title vested in them when this treaty was made and the allotment and patent issued pursuant thereto created a title of the highest character. The treaty itself declares that it shall be in fee simple, and that is the highest and best title known to the law; and when they get that, unless there is some positive law that prohibits the Indians and mixed-bloods from making a transfer, then he has as good right to make a transfer as any of the more favored white race, the allotment having been made to him, I think. I think he had an undoubted right to make the conveyance to Nuckolls or any one else, as it is claimed he did do; but, if he had not the title at the time, the deed that he made to Nuckolls conveyed whatever claim he did have, and if he afterwards acquired a title to the land in question, when he did acquire it it would inure to the benefit of Nuckols or to those under whom the plaintiff claims—that is, if the deeds have been proven to your satisfaction. So, on the whole, I think it is wholly immaterial whether the party was an Indian or a white man, for he would apply the same rule in either event, and though he may have had no title to the land at the time that he made the conveyance, if he afterwards proved a title, he then had a perfect title if he did not before; then that perfect title would inure to the benefit of Houston Nuckolls if Nuckolls got a good deed from him at the time of the alleged purchase. That point, I think, was really immaterial, whether George Washington owned the land at the time that he conveyed it, but in giving such instructions the same was modified by the court as follows, viz:

60 At the time of the alleged conveyance from George Washington to Houston Nuckolls the law of this Territory, as it then existed, and where George Washington resided, and where the deed was made, was peculiar in its provision. It is claimed where a minor owns land and other property and made a sale of it and transferred it to an innocent purchaser—one who knew nothing about his age—representing himself to be 21 years old, so that he could lawfully convey, then he is estopped from setting up the fact that he is a minor. That — the substance of one of the instructions asked for by the plaintiff, and I give it in the language in which it is asked for, because I think it is correct — that is, if George Washington, the grantor, represents to Houston Nuckolls at the time that he made the sale or transfer by the deed in question, represented himself to be 21 years of age, and Mr. Nuckolls believed that fact, relying upon it, took the deed, paying the money and transferring the pony, then he is afterwards estopped from saying that he was not twenty-one years old at the time that he made the deed; but if he made no such representation as that, of course it would be wholly immaterial, and he would not be estopped from denying the validity of the deed. Then, again, it is possible that if such representations were made, that Houston Nuckolls knew that they were false. If the representations were made and Houston Nuckolls knew that they were false, he would stand in the same position as if they were not made at all. In order to have those representations effective the person to whom they were made must

act upon them, because he believes what the party said about them, and if that was not so, it is immaterial what the party said in reference to his age.

Request of Plaintiff.

"If the jury find from the evidence that George Washington, the son of Lag-gar-ash, represented himself to be twenty-one years of age at the time of the making of the alleged deed to Houston Nuckolls, and that Nuckolls relied upon such representations
61 and purchased said land and received of said Washington a conveyance of said land, then as a matter law such conveyance would be good, even though George Washington was not of age."

With the qualifications I have added, that instruction is to be taken as it is here given; that instruction is pretty craftily worded and it requires the explanation that I have given it, and when you take the two together I think you will have no difficulty. It says if Nuckolls relied on that. The way the law was, a party might rely on that and claim his protection under the law; but nevertheless he might have known that he was relying on a broken reed. Did he have reason to believe that he was twenty-one years of age, or did he know that he was not after those representations were made, if they were made? He might get a person to say that he was twenty-one years of age in the presence of a witness and relied upon that fact. If he did not believe it and rely upon it, then he would not be protected.

Mr. WEBSTER: Give me an exception.

The COURT: The question was raised and discussed to some extent after the copy of one deed from George Washington to Houston Nuckolls had been received in evidence, properly acknowledged and properly recorded. When that is done the law makes a certified copy of the record proper evidence when the party interested cannot make the original upon which the claim is based. Here there was sufficient evidence, as I thought, to justify the introduction of secondary proof, and that was done, and on the strength of that the deed was admitted, but afterwards it appeared from the testimony of Mr. Walther that when the deed was executed it was done with an interpreter; that an interpreter done all the talking, and, so far as he knew, nothing was said in English by George Washington that Mr. Walther understood. It was done through an interpreter.
62 If that fact had been made to appear before the introduction of that deed in evidence, my impression is that I would have sustained the objection to it and required the party to do as he has done with reference to the other deeds—that is, we would ignore the record entirely, because that would not be proper acknowledgment, for the reason that the officer must explain the matter so that he may understand it; an officer is bound to do it; he cannot rely upon the representations of other parties; the party himself must understand what he is doing when he executes a deed, and he must

acknowledge it to be his own voluntary act and deed, and if the officer does not do that he comes short of his duty.

The officer must know that the deed is properly acknowledged, and he cannot know it through an interpreter unless he understands the language, and it seems to me that there is a good reason for applying such a rule as that. If the grantor does not know what he executes, it cannot be said that it was his voluntary act and deed that conveys his land away; but as the deed was admitted and there was afterwards some testimony from Mr. Walther that tended to show that the deed was executed in his presence, I think that might obviate the difficulty and cure the defect.

With reference to the chain of title, there are several deeds under which the plaintiff claims. Of course, I think I must say to you, so far as that record is concerned, with the explanation that we have, we must ignore that and treat it as though no acknowledgment had ever been made, as though no record of that deed had ever been made, unless there is testimony enough outside of that to satisfy you that George Washington executed the deed at the time and place *it* in the manner claimed, knowing what it was what he was doing; that the transaction was fair, honest, open, and above board, and legitimate as between the parties thereto, then the plaintiff cannot recover at all.

63 That is the starting point, that is his first deed; but if the testimony satisfies you that George Washington was of age at the time, or if he represented himself to be of age, and Mr. Nuckolls was induced to purchase on the strength of that representation, believing and relying upon the representation, then the conveyance would be good; but you have to go beyond the record and beyond the certificate of the officer who took the acknowledgment, and say from the evidence, and say that that was the deed from Washington to Nuckolls. What is said of that deed in reference to the acknowledgment is true of the others.

Here is one deed from Nuckolls to Ballard; it is claimed that the deed is imperfect; that there was no description of any land in it so that a surveyor could go upon the land and identify it. If the record of the deed is correct, then that proposition is correct, as the defendants have undertaken to maintain it. If that deed had not the number of the township in it when it was made, when it was placed on record, then it would amount to nothing, because there is no description therein so that anybody could identify it and go upon the land and say it was township one, two, three, or four.

There are parts of four townships in range 17, and no one could say whether it was one, two, three, or four, or any other township, and therefore the deed itself is worthless—that is, if the deed was made in that way, though it might afterwards have been changed and corrected. How are you to determine that question? I will say, if you are satisfied with the testimony, that that was the condition of the deed when it was made by Nuckolls and delivered to his grantees and was not afterwards corrected with the knowledge and consent of Nuckolls, that then no other person would have the right to do so; they would have no right to correct any such mistake unless it

was with the knowledge and consent of Houston Nuckolls. If the deed was in that condition, as claimed by the defendants, when
64 it was delivered, when it went into the hands of Stark for Ballard, how was it afterwards? Has it at any time been filled out afterwards? What are the probabilities about that? Where a deed is lost and the testimony is imperfect and the facts not made manifest from the testimony presented, from all the questions arising out of controversy you may have to speculate on probabilities to some extent where the controversy arises from the loss of a deed, as is done in this case. You see what the testimony is and say what the probabilities are under the testimony, and if you are satisfied that that deed from Nuckolls to Ballard was in the condition in which we find it in Richardson County records, and that it was never filled up with the knowledge and consent of Houston Nuckolls, then any one claiming through that chain of title could not recover here, because it would be a worthless description and a worthless deed. There are two subscribing witnesses to that deed, a copy of which has been presented here. There is some testimony that locates one of them in the State of Oregon or Washington Territory. He is out of reach, and his attendance could not be procured. We might not be able to procure his testimony. It is an individual I have known for 27 or 28 years, and it strikes me with some force, because I did not know where he was; and again, the name of William W. Buchanan, a subscribing witness which I have also known for some 27 or 28 years, there is no testimony to show where he is; I do not know and have not heard for many years. There has been no effort, so far as I know, on this trial to show where he is; that may be a suspicious circumstance; he is a subscribing witness; he ought to be produced if he can be, and where there is no effort made to show where he is on or before the trial it may be a suspicious circumstance, and the law requires the best evidence of the execution of a deed where its execution is denied or where it is not properly acknowledged. The production of the subscribing witness, who must first be called to tes-
65 tify, is the best evidence and highest proof known to the law, and it is the duty of the party who relies on the deed to produce that witness in court if that can be done; and if he cannot do that, he ought to take his deposition; and if he cannot do either, he should prove by those who know his handwriting that the handwriting of the subscribing witness is true; and where neither is done, and the absence of the witness is not accounted for, it is a suspicious circumstance, and the jury are entitled to consider it and give it such weight as it deserves.

It may be, as the defendant claims, that this deed was executed and the number of the township left out—left blank—and was afterwards filled up by Mr. Stark or some one else under his direction. If that was so, unless it was done with the knowledge and consent of Houston Nuckolls it could not have any binding force as against any one. In reference to the deed from Ballard to McMillan, it may be that the testimony is entirely satisfactory on that point. The subscribing witnesses to that deed, as appears by

the testimony of Mr. Stark, seem to be dead. The handwriting on the lost deed, of course, cannot be shown; they cannot produce it and have it compared and give experts an opportunity to look at the handwriting.

So far as that is concerned, of course that portion of the proof in this case would have to be dispensed with in the absence of the deed itself, and where the subscribing witness is dead that would let in the other proof, and any one who knew the facts, that the deed had been made by Ballard to McMillan, would be competent to testify on that point. So far as that deed is concerned, I think that is satisfactorily shown. With reference to the deed from McMillan to Hegler, it may be very different.

There are subscribing witnesses to the copy that is here presented in evidence. Who undertook to account for their absence? Does it appear that any effort whatever has been made to procure
66 the testimony of the subscribing witness to that deed? So far as I remember, there is none whatever; but other testimony has been let in because of the peculiarity of this case. There has been no effort made to produce the testimony of the subscribing witness- or account for their absence. As I said before, the circumstances attending that may be exceedingly suspicious. The deed might have been fixed up for the purpose. Where the best testimony is accessible, that, of course, ought to be produced, and if it is not produced, the absence of it is usually a very suspicious circumstance, and the jury can attach such weight to that fact as it sees proper, in its own discretion.

When a suit is brought to recover possession of land the party in possession has a decided advantage over the one out of possession. The plaintiff has got to rely on his own title. It would not make any difference whether the party in possession had any title at all or not. When a party brings his suit he must rest alone on his own title; he cannot rely on the weakness of the title of his adversary. So far as the title of these defendants is concerned, it is no matter whether they have any title or not, they are in possession and they resist the right of plaintiff to recover. When they do that the plaintiff is put upon his proof, and he must make out in himself a perfect title before the jury can find in his favor; and if they have not done that under the rules which have been stated to you, then manifestly the defendant is entitled to the verdict.

There is no question of an innocent purchaser. Houston Nuckoll conveyed by quitclaim deed. It is a special warranty, and the difference between a special warranty and a quitclaim deed amounts to nothing, so far as these deeds are concerned. If these defendants were claiming under Houston Nuckolls it would be different;
67 they all claim under George Washington, and if Houston Nuckolls had a valid title and could have given a good and valid title to any one, especially the party to whom the conveyance has already been made, then he would be entitled to a verdict; but if he had no title, then the plaintiff, if the chain of title is all right, would take such title as Nuckolls had—no better or greater or any other; and if Nuckolls' title was subject to be defeated after George

Washington obtained his majority, of course these plaintiffs would stand in the same attitude, because there is no question of an innocent purchaser, because Nuckolls' deed to Ballard is a special warranty and warrants the title against all persons claiming under or through him—that is, in substance a quit claim deed; and wherever a person claims under a quitclaim deed or special warranty, there is no such question as an innocent purchaser arising.

On the whole, if you find that George Washington, the son of Lag-gar-ash, was twenty-one years old when he made the conveyance to Nuckolls, or that he represented himself to Houston Nuckolls when he made the deed as being twenty-one years of age, and Houston Nuckolls relied upon that fact and did not know otherwise, then Houston Nuckolls acquired a good and perfect title to that land; but if he was not twenty-one years of age when he made the conveyance, and made no such representations with reference to his age, then the defendant is entitled to recover.

I do not remember the description of this one hundred acres that was conveyed by Ballard to Wilkinson. The plaintiff cannot recover that land. If the jury should be satisfied from the evidence that Lag-gar-ash, the father of George Washington, could speak a little English; stood by and transacted the business for George Washington, and George stood there and heard what was going on without understanding it, he would not be bound by it. That is all there is
of that. If a party makes a deed to land he must know what
68 he is doing, and he must acknowledge it to be his voluntary act and deed. If all of that does not exist, then the party does not part with the title to the land. There might be some question about the rescinding of a contract within a reasonable time, but if the testimony should satisfy the jury that George Washington was but fifteen or sixteen years old, or thereabout, in 1859, when it is claimed to have made the deed to Houston Nuckolls, then it would take until 1865 for him to obtain his majority, and he would have to disaffirm the contract within reasonable time after obtaining this majority, and within a year or so would be a reasonable time.

If the jury should be satisfied from the evidence that the plaintiff is entitled to recover the possession of the premises, they will also find what was the rental value of the land four years prior to the commencement of this suit and every year since that, whatever that might be. In determining that question, of course you can base your estimate of damages on the value of the land as it stood when the defendant took possession of it, not the rental value of the land after they improved it, but the rental value of the land as they found it, and not after it was made valuable and improved and placed in a state of cultivation. That is not the law; so if you find for the plaintiff, when you come to make up the assessment for the damages, you find what the rental value of the premises was before the defendant took possession.

Question by a juryman: They were unimproved lands?

The COURT: Yes; I think that is conceded by both sides. It would be the rental value of unimproved property before the de-

fendants put any improvements upon the same or as it would have remained had they stayed off from it.

Of course, if you find generally for the defendant, you can sign the verdict which Judge Reavis has prepared and which none of you can read. It is correct in its form. If you find for the plaintiff you will find on the other two propositions.

69 If you happen to differ about any of the testimony about the character of any of the documentary evidence that has been offered, you can come into court and have it furnished. That could not be sent to the jury-room unless parties on both sides would consent. You can have the pleadings. What objection will there be to the jury taking the deed from Ballard to Wilkinson?

The counsel on both sides responded that there was no objection. With this the jury retired in charge of a bailiff.

C. A. POTTER, *Reporter.*

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer S. Dundy, district judge, presiding at the trial of the above-entitled cause, do hereby certify that the above and foregoing is a true bill of exceptions, and includes all the evidence introduced or offered by either party at the trial, and the oral instructions given by the court to the jury, together with instructions requested on part of plaintiff and refused, and it is accordingly ordered that this bill of exceptions be allowed, signed, sealed, and made a part of the record herein.

Witness my hand and the seal of the circuit court of the United States, district of Nebraska, at Lincoln, this 6th day of June, 1885, and of the — United States the one hundreth and ninth.

ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 107, E U. S. circuit court, district of Nebraska. James D. Hegler *vs.* George Faulkner. Bill of exceptions. Filed June 6th, 1885. Elmer D. Frank, clerk. Except as to the charge of the court, we find this bill of exceptions correct. June 5th, 1885. Reavis and Schoenheit, att'ys for defendants.

70 Thereupon, afterwards, to wit, at the May term of said court, on the 13th day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 529, Journal "N" of said court, to wit:

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, AUGUST SCHOENHEIT, JAMES COTTIER, and EDWIN S. TOWLE, Defendants. } 107, E.

This cause having come on to be heard this 13th day of June, 1889, on the motion of the defendants herein for the execution of

the mandate from the Supreme Court of the United States, which mandate is as follows, to wit:

"UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

[SEAL.]

Whereas lately, in the circuit court of the United States for the district of Nebraska, before you or some of you, in a cause between J. D. Hegler, plaintiff, and George Faulkner, August Schoenheit, James Cottier, and Edwin S. Towle, defendants, wherein the verdict of the jury and the judgment of the said circuit court, entered in said cause on the 10th day of January, A. D. 1885, are in the following words, viz:

'We, the jury empaneled and sworn in the above-entitled cause, do find all the issues in this cause with the defendants.

'It is thereupon considered, ordered, and adjudged by the court that the defendants are the owners *are the owners* of the land involved in this action, to wit, the northeast quarter of section eight, town. two (2), range seventeen (17) east, 160 acres, and thirty (30) acres off the east side of the northeast quarter of the northwest quarter of said section, and thirty acres off the east side of the southeast quarter of the northwest quarter of said section, in the aggregate 220 acres, situate in Richardson county, State of Nebraska, and were at the commencement of this suit, and that said defendants were then and still are entitled to possession thereof, and that the plaintiff's claim of title to said land was and is invalid, and said plaintiff was not at the commencement of this action and is not now entitled to the possession of said land.

71

'It is further ordered by the court that said defendants have and recover of and from the said plaintiff their costs herein expended, taxed at $—,' as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said plaintiff, J. D. Hegler, recover against the said defendants one hundred and thirty-three — and twenty-five cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings.

MAY 14, 1888.

You therefore are hereby commanded that such execution
72 and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the third day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Costs of Plaintiff.

Clerk	$56 75
Printing record	56 50
Attorney	20 00
	$133 25

JAMES H. McKENNEY,
Clerk of the Supreme Court of United States."

It is therefore ordered and adjudged that the judgment heretofore rendered in this cause be, and the same is hereby, reversed and vacated.

And it is further ordered and adjudged that the plaintiff, John D. Hegler, recover against the said defendants the sum of $133.35, his costs herein expended, as appears by said mandate.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, AUGUST SCHOENHEIT, JAMES COTTIER, and EDWIN S. TOWLE, Defendants. } 107, E.

The judgment of this court in the above-entitled cause heretofore rendered having been reversed and set aside pursuant to the mandate from the Supreme Court of the United States, and this cause coming on further to be heard on the motion of the defendants for a judgment upon the verdict of the jury heretofore rendered herein,
and the court being fully advised in the premises, it is there-
73 upon considered, ordered, and adjudged by the court that the defendants are the owners of the land involved in this action, to wit, the northeast quarter of section eight, town. two (2), range seventeen (17) east, 160 acres, and thirty (30) acres off the east side of the northeast quarter of the northwest quarter of said section, and thirty (30) acres off the east side of the southeast quarter of the northwest quarter of said section, in the aggregate 220 acres, situate in Richardson county, State of Nebraska, and were at the commencement of this suit, and that said defendants were then and still are entitled to possession thereof, and that the plaintiff's claim of title to said land was and is invalid, and said plaintiff was not at the commencement of this action and is not now entitled to the possession of said land.

It is further ordered by the court that said defendants have and recover of and from the said plaintiff their costs herein expended, taxed at $—.

To which order and judgment the plaintiff excepts.

74 Thereupon, afterwards, to wit, on the 16th day of August, 1889, affidavits were filed in said case; which said affidavits are in words and figures following, to wit:

Affidavit of Frank Musselman.

In the Circuit Court of the United States for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEO. FAULKNER *et al.*, Defendants. } Affidavit.

UNITED STATES OF AMERICA,
District of Nebraska, Richardson County, } ss:

Frank Musselman, being first duly sworn, on his oath says: I am acquainted with the northeast quarter of sec. eight (8), in town. two (2) north, of range seventeen (17) east of the 6th P. M., in the county of Richardson and the State of Nebraska, and also am acquainted with the thirty acres of- the east side of the northeast quarter of the northwest quarter of said section eight (8) and thirty acres off from the east side of the southeast quarter of the northwest quarter of said sec. eight (8), being in the aggregate 220 (two hundred and twenty) acres, and know the value of said lands and of other lands in that vicinity, and said lands are of greater value than $25.00 per acre. The aggregate value of said lands is more than $5,500.00; and further affiant says not.

FRANK MUSSELMAN.

Subscribed in my presence and sworn to before me this 2nd day of August, 1889.

M. W. MUSSELMAN,
Notary Public. [SEAL.]

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 107, E. U. S. circuit court,
75 district of Nebraska. J. D. Hegler *vs.* George Faulkner *et al.* Affidavit of Frank Musselman as to value. Filed Aug. 16, 1889. Elmer D. Frank, clerk.

Affidavit of M. W. Musselman.

In the Circuit Court of the United States for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEO. FAULKNER *et al.*, Defendants. } Affidavit.

UNITED STATES OF AMERICA,
District of Nebraska, Richardson County, } *ss:*

W. M. Musselman, being first duly sworn, on his oath says: I am acquainted with the northeast quarter of sec. eight (8), in town. two (2) north, of range seventeen (17) east of the 6th P. M., in the county of Richardson and the State of Nebraska, and also am acquainted with the thirty acres off the east side of the northeast quarter of the northwest quarter of said section eight (8) and the thirty acres off from the east side of the southeast quarter of the northwest quarter of said section eight (8), being in the aggregate two hundred and twenty (220) acres, and know the value of said land and of other lands in that vicinity, and said lands are of greater value than twenty-five dollars ($25.00) per acre. The aggregate value of said lands is more than $5,500.00; and further affiant says not.

M. W. MUSSELMAN.

Subscribed in my presence and sworn to before me this 3 day of August, 1889.

[SEAL.] EZRA E. METZ,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 107, E. U. S. circuit court,
76 dist. of Nebraska. J. D. Hegler *vs.* Geo. Faulkner *et al.* Affidavit of M. W. Musselman as to value. Filed Aug. 16, 1889. Elmer D. Frank, clerk.

Affidavit of W. R. Cain.

In the Circuit Court of the United States for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEO. FAULKNER *et al.*, Defendants. } Affidavit.

UNITED STATES OF AMERICA,
District of Nebraska, Richardson County, } *ss:*

Mr. W. R. Cain, being first duly sworn, on his oath says: I am acquainted with the northeast quarter of sec. eight (8), in town. two (2) north, of range seventeen (17) east, of the 6th P. M., in the county of Richardson and the State of Nebraska, and also am acquainted with the thirty acres off the east side of the northeast quarter of the

northwest quarter of said section eight (8), and the thirty acres off from the east side of the southeast quarter of the northwest quarter of said section eight (8), being in the aggregate two hundred and twenty (220) acres, and know the value of said lands and of other lands in that vicinity, and said lands are of greater value than twenty-five dollars ($25.00) per acre. The aggregate value of said lands is more than $5,500.00; and further affiant saith not.

W. R. CAIN.

Subscribed in my presence and sworn to before me this 3 day of August, 1889.

M. W. MUSSELMAN, [SEAL.]
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 107, E. U. S. circuit court, district of Nebraska. J. D. Hegler *vs.* Geo. Faulkner *et al.* Affidavit of W. R. Cain as to value. Filed Aug. 16, 1889. Elmer D. Frank, clerk.

77 Thereupon, afterwards, to wit, on the 18th day of October, 1889, a writ of error was issued in said case, the following of which is the original:

78 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between J. D. Hegler, plaintiff, and George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, defendants, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court of the United States, at Omaha, in said district, this eighteenth day of October, 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 107, E. United States circuit court, district of Nebraska. J. D. Hegler *vs.* George Faulkner *et al.* Writ of error. Filed Oct. 18, 1889. Elmer D. Frank, clerk.

79 And thereupon, afterwards, to wit, on the 6th day of June, 1890, a citation was issued in said case, the following of which is the original:

80 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein J. D. Hegler is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elmer S. Dundy, acting judge of the circuit court of the United States for the district of Nebraska, at Omaha, this 6th day of June, 1890.

ELMER S. DUNDY, *Judge.*

☞ Service, see back hereof.

81 The defendants within named hereby accept service of the within citation & waive copy of same.
June 20, 1890.

EDWIN S. TOWLE,
Att'y for Def'ts.

[Endorsed:] No. 107, E. United States circuit court, district of Nebraska. J. D. Hegler *vs.* George Faulkner *et al.* Citation. Filed June 25, 1890. Elmer D. Frank, clerk.

82 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios, from 1 to —, contain true and faith-

ful transcripts from the records and files of said court in the case of James D. Hegler *vs.* George Faulkner *et al.*, and that a copy of the writ of error and citation have been lodged and remain in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 26th day of June, A. D. 1890.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 14,126. Nebraska C. C. U. S. No. 166. J. D. Hegler, plaintiff in error, *vs.* George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle. Filed September 1, 1890.

Office Supreme Court U. S.
FILED.
DEC 8 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. ~~288~~. 166.

J. D. HEGLER, Plaintiff in Error,

vs.

GEORGE FAULKNER et al., Defendants in Error.

Error to Circuit Court of the United States for the District of Nebraska.

BRIEF FOR PLAINTIFF IN ERROR.

McGILL & WALLACE, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1893.

J. D. HEGLER, Plaintiff in Error,
vs.
GEORGE FAULKNER *et al.*
No. 166.

In Error to the Circuit Court of the United States for the District of Nebraska.

Brief for Plaintiff in Error.

In 1870 the plaintiff in error commenced an action of ejectment against defendants in error to obtain the real estate described in the Record, and which is the subject of action therein. This action of 1870 was commenced in the District Court of Richardson County, Nebraska, and, after issue joined, was removed to the Federal court, but was disposed of without determination of the merits. October 4, 1878, the same case, between the same parties, for the same cause of action, was commenced in the said State court. Defendants removed to Federal court before joining issue. In the Federal court the cause was in substance an action of ejectment, and on a general denial was tried by a jury, resulting in verdict and judgment for defendants.

It is admitted that the amount involved exceeded $5,000, and is large enough to give this court jurisdiction (Transcript, p. 3).

Motion for new trial overruled and stipulation for bill of exceptions (page 5 to 7, inclusive).

The trial judge certifies that the bill of exceptions, from pages 7 to 43, contains all the evidence and instructions (p. 43).

Thus stood the case when it came to this court before (127 U. S., 182). It was then reversed, as the Circuit Court had no jurisdiction, the Record failing to show proper citizenship of the parties, and also any steps being taken to remove the case from the State court. The case went back, and these defects were cured (Rec., 4 *et seq.*), and judgment again rendered for defendants, and this writ of error was sued out.

The action was for the recovery of 320 acres of land situated between the Great and Little Nemeha rivers, in Richardson County, Nebraska, and describes the north half of section eight (8), township two (2), range seventeen (17). This land was in a tract set apart for mixed-blood Indians, pursuant to the treaty of Prairie du Chien, concluded July 15, 1830 (7 U. S. St. L., 328), and the act of Congress approved July 31, 1854, and found in section 5 (4), 10 U. S. St. L., p. 332 (Rec., 13 *et seq.*).

April 15, 1859, the land was allotted by the United States to a half-breed Indian named George Washington, and certificate of allotment delivered accordingly.

Plaintiff in error claims through a chain of conveyances commencing with deed from George Washington to Houston Nucholls, dated April 16, 1859.

Defendants claim through two deeds, one from George Washington to A. Schoenheit and E. S. Towle, dated November 3, 1866, and the other from George Washington and wife to A. Schoenheit and E. S. Towle, dated February 28, 1868 (Rec., 34 *et seq.*).

Defendants in error, among other things, contend that at the time George Washington conveyed to Nucholls he was not of competent age to convey, and for that reason plaintiff's title is bad. Under the laws in force in Nebraska at that time other questions of fact became pertinent on the subject of infancy. The Territorial laws referred to read as follows:

"SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money and property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority.

"SEC. 43. No contract can be thus disaffirmed in cases when, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting." (Terr. Session Laws Neb., 1856, p. 165.)

Plaintiff in error contends that George Washington was of age when he conveyed to Nucholls, and that if he was not, he did not rescind within a reasonable time after coming of age, nor bring himself within the conditions required by law to enable him to rescind.

When this cause was first in suit, as above mentioned, the defendants in error in their answer correctly stated the several conveyances under which the respective parties claimed (Rec., 38 *et seq.*) showing plaintiff's chain to be—

April 16, 1859, George Washington to H. Nucholls.
April 20, 1859, Nucholls to A. S. Ballard.
September 16, 1859, Ballard to McMillen.
October 13, 1859, McMillen to plaintiff in error.

The originals of these deeds were lost, as shown by the testimony of Hegler, Stark, Morrison, and Broady; they

consequently had to be proved by the Record or secondary evidence. In the record of the deed from Nucholls to Ballard the number of the township was omitted, and that had to be supplied in the original by secondary evidence.

Assignments of Error.

Plaintiff in error assigns as error the following:

1.

The court erred (Rec., 13) in sustaining the objections to the introduction in evidence, of the exemplification from the records of the Indian Department of the instructions pursuant to and provided by the statutes for carrying out the allotments to the half breeds. Sec. 5 (4), p. 332, 10 U. S. Stat., reads as follows:

"*And be it further enacted*, That the President be, and he is hereby, authorized and required to cause to be fulfilled the stipulations of the ninth and tenth articles of the treaty with the Sacs and Fox and other tribes of Indians concluded on the 15th day of July, one thousand eight hundred and thirty, by causing said reserved tracts to be surveyed and allotted to persons properly entitled to the same, in fee simple, in such manner and under such rules and regulations as he may prescribe," &c.

The rules and regulations so caused to be prescribed were contained in the paper so excluded, which says to the agent appointed to make the allotment, "prepare your report in full, to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe," etc.

It was a necessary thing to do, to make some regulation by which to distinguish to whom to allot and to identify the ones receiving allotments. With the best and most complete and careful regulations, much con-

fusion, uncertainty, and trouble must arise in matters of identity. One of the most effective and most difficult marks of description by means of which to identify is the age. By taking age at a given time the personal appearance at any time after would, to a certain degree, correspond so as to be a means of identifying. Names of Indians are of but little account, because so changeable and uncertain. All sorts of schemes were, in the nature of things, to be used to obtain the lands by designing white men by means of false identity. At all events, the law left these things in the discretion and judgment of the President, and he, pursuant to law, did provide that, among other things, in the investigations to determine who was entitled to land, that the age should be taken and recorded to aid in preserving the identity. Now, by what right can we ignore that record and say it is nothing for any purpose—not even *prima facie* evidence of anything? We submit that it cannot be treated as a nullity, and that the whole investigation and findings under these instructions are *prima facie* evidence of all that is recorded thereof. In order to get at this *prima facie* evidence it is necessary for us to have in evidence the said instructions caused to be prescribed pursuant to law; that is the basis of the whole question. This brings us to the next assignment of error.

2.

The court erred in excluding from the jury the census or list of half-breeds entitled to lands, dated February 4, 1858, containing the name of George Washington, son of Lag-gar-ash, mixed Iowa, 20 years of age (Rec., 14, *et seq.*). This is the record of the findings in the examinations made under the instructions from the Department of Indian Affairs pursuant to the act of Congress above given. It is *prima facie* evidence of the age. It is a record on that subject wisely made pursuant to law and should have been admitted for what it is worth. It was

intended as a safeguard against local land sharks. What is said in the first assignment is applicable here. The court erred in excluding this record.

3.

The court erred in excluding the deposition of William M. Stark, taken November 8, 1870, to which the said original census list was attached (Rec., 29 *et seq.*). What is said in the second assignment applies to this, and this much more may be said: In this deposition, Stark identified himself as the agent who made the allotment, and held the original census and issued and delivered the original allotment to George Washington. This goes to show his opportunities for knowing the facts of which he speaks, and hence bears on the credibility of his evidence.

4.

The court erred in excluding, as evidence, from the jury the answer of defendants in error in the first suit, involving the title to said land, which answer was sworn to and filed December 29, 1871 (Rec., *supra*). This answer admits that there was a chain of conveyances from Nucholls to plaintiff in error good enough to carry to plaintiff in error whatever right Nucholls had. It ought to have been admitted for this pupose. That answer also admits that on April 16, 1859, George Washington was fifteen years old. It ought to have been admitted for that purpose. More will be said as to this, touching the disaffirmance by Washington's deed to Schoenhiet & Towle, attorneys and real defendants herein.

5.

The court erred in instructing the jury as follows:

"The question was raised and discussed to some extent after the copy of one deed from George Washington to Houston Nucholls had been received in evidence, properly acknowledged, and properly recorded; when that was done the law makes a certified copy of the record proper evidence when the party interested cannot make

the original upon which the claim is based. Here there was sufficient evidence, as it thought, to justify the introduction of secondary proof, and that was done, and on the strength of that the deed was admitted, but afterwards it appeared, from the testimony of Mr. Walther, that when the deed was executed it was done with an interpreter; that an interpreter did all the talking and, so far as he knew, nothing was said in English by Geo. Washington that Mr. Walther understood. It was done through an interpreter.

"If that fact had been made to appear before the introduction of the deed in evidence, my impression is that I would have sustained the objection to it and required the party to do as he has done with reference to the other deeds—that is, we would ignore the record entirely, because that would not be proper acknowledgment, for the reason that the officer must explain the matter so that he may understand it; an officer is bound to do it. He can not rely upon the representations of other parties; the party himself must understand what he is doing when he executes a deed, and if the officer does not do that he comes short of his duty.

"The officer must know that the deed is properly acknowledged, and he can not know it through an interpreter unless he understands the language, and it seems tn me there is good reason for applying such a rule as that. If the grantor does not know what he executes it can not be said that it was his voluntary act and deed that conveys his land away; but as the deed was admitted and there was afterwards testimony from Mr. Walther that tended to show that the deed was executed in his presence, I think that might obviate the difficulty and cure the defect.

"With reference to the chain of title, there are several deeds under which the plaintiff claims. Of course, I think I must say to you, so far as that record is concerned, with the explanation that we have, we must ignore that and treat it as though no acknowledgment had ever been made. as though no record of that deed had ever been made, unless there is testimony enough outside of that to satisfy you that George Washington executed the deed at the time and placed it in the manner claimed, knowing what it was—what he was doing—that the transaction was fair, honest, open, and above-

board and legitimate as between the parties thereto, then the plaintiff can not recover at all. This is the starting point—that is, his first deed; but if the testimony satisfies you that George Washington was of age at the time, or if he represented himself to be of age, and Mr. Nucholls was induced to purchase on the strength of that representation, believing and relying upon the representation, then the conveyance would be good; but you have to go beyond the record and beyond the certificate of the officer who took the acknowledgment and say from the evidence and say that that was the deed from Washington to Nucholls" (Rec., 43–4).

That an acknowledgment can be taken through an interpreter, if that question could be raised in this proceeding,

See Norton *v.* Meader, 4 Sawy. (U. S.), 603;
De Arnaz *v.* Escandon, 59 Cal., 486;
Walter *v.* Weaver, 57 Tex., 569;
Dewey *v.* Campau, 4 Mich., 565.

This quotation could not be abbreviated and give the connections and statements of the instruction on the subject with requisite fullness.

It is erroneous for several reasons:

1. It is confusing to the jury. It first says the record was admitted; then it says, because of something the witness, Walther, testified to, it should not have been admitted; then says the acknowledgment was through an interpreter, which vitiates it; that the officer did not do his duty; then says, but as the deed was admitted (meaning record of deed, because the deed had been lost and could not be offered), and afterwards Walther gave some testimony they thought might obviate the difficulty and cure the defect; then says they must ignore and entirely discard the record and find from other evidence a straight, honest transaction, with the parties understanding each other. By the time a jury would get through with that, they would have concluded that about all they could make out of it was that the judge desired that

they should find for defendants, and the natural result would be they would find accordingly.

With this medley, in the shape of an instruction, before the jury, it is impossible to say the plaintiff was not prejudiced—indeed, it is almost certain he was. But unless it appears beyond doubt he was not and could not have been prejudiced by it, there must be a reversal.

Vicksburg, &c., *v.* O'Brien, 119 U. S., 99;
Dist., &c., *v.* Woodbury, 136 *Ib.*, 450;
Wardell *v.* Hughes, 3 Wend., 416;
Inglish *v.* Breneman, 5 Arks., 378–383.

2. Another objection to this instruction is that, in so far as it questions the knowledge of George Washington of the transaction, it is altogether beyond the range of the evidence and tends to lead the jury into a different direction. Lag-gar-ash, father of George Washington, says that George did make the deed to Nucholls, and he is a witness for defendants. He says George made the deed and got a horse for $150 and $50 in money, making $200, but that his son was under age (Rec., 35). George was then present, but did not give his deposition to contradict (Rec., *sup.*). The answer of these defendants, in 1871, which was erroneously excluded, admits the same thing.

3. That instruction states the law erroneously. It says that an acknowledgment can not be taken through the medium of an interpreter, which is not the law. Anything can be done through an interpreter; nothing is too solemn or sacred in law to be done through the medium of an interpreter. But in another way this instruction states the law erroneously; it tells the jury in substance that because the officer, Walther, who took the acknowledgement, testified that it was done through an interpreter that the certificate of acknowledgment, although regular in form, is no evidence of the execution of the deed, and for the

same reason the record is no evidence of title. This is not law. The certificate of acknowledgment is the highest evidence of the execution of the deed, and proves the execution so as to entitle the deed to be recorded and offered in evidence without further proof, and in case the original can not be had, that the record can be offered in lieu of the original without other or further proof. Even if the certificate can be contradicted by parol, it is still evidence to be considered, and the jury may say whether they will believe the official act or the after assault from the breath of the witness, who may have become an ally of some party after the controversy arises. The certificate is *prima facie* evidence of execution, and is still evidence to remain with the jury for what they think it worth, even if attacked by oral testimony. The withdrawing the certificate of acknowledgment and the record of the deed from Washington to Nucholls absolutely from the jury was certainly erroneous, and even of such a prejudicial kind that it left the case in such a condition, that there was nothing left that any jury was likely to do but find for the defendants on that simple question of the execution of deed from Washington to Nucholls—a question entirely foreign to the real point in litigation, as conceived by the parties, as shown by their pleadings and evidence, and as admitted by the court in another part of the instructions in these words: "The important question for you to determine is as to the age of George Washington at the time of this allotment and the time of making the alleged transfer from him to Houston Nucholls, under whom the plaintiff claims." (See authorities to ninth assignment of error.)

6.

The court erred in following up the instructions quoted in assignment 5 with instructions in these words: "What is said of that deed in reference to the acknowledgment

is true of the others" (Rec., 44). This could only be true of the deed from Nucholls to Ballard, where the receiver omitted the number of the township, but could not be true of any of the subsequent deeds, all of which were good and regular on the face of the records. What is said of the fifth assignment of error applies with full force here, except as to the one deed from Nucholls to Ballard.

7.

The court erred in suggesting to the jury, in instructions, that the deed from Nucholls to Ballard might have omitted the number of the township when made, and after being recorded the number of the township might have been wrongfully written in (Rec., *sup.*). There was no evidence upon which to base such an instruction. For that reason it was misleading and erroneous. As to the loss of the original deed see testimony of Broady, Rec., 17; of Thomas, p. 20; of Stark, p. 25; of Hegler, pp. 23, 24. As to condition of record, see deposition of Ryan, p. 32, and Exhibit "A," p. 23. As to whether the number of the township was in the deed, see deposition of Stark, p. 25, and Hegler, pp. 28, 31.

8.

The court erred in suggesting, in the instructions, a suspicion against the execution of the deed from Nucholls to Ballard, when calling attention to the failure to get the testimony of the subscribing witness, W. W. Buchanan, and closing with these words:

"He ought to be produced if he can be, and when there is no effort made to show where he is on or before the trial, it may be a suspicious circumstance, and the law requires the best evidence of the execution of the deed when its execution is denied or where it is not properly acknowledged" (Rec., 45).

The controversy was not over the execution or acknowledgment of that deed, but whether the number of the township was there. The subscribing witness is not supposed to know that. He is only supposed to know whether the grantor actually signed it. When George Washington stood by, his father swore he conveyed the land and George never took the stand to deny it, and it never was denied, and the acknowledgment was regular and in proper form. The jury were probably confused as to whether, as a matter of law, they should ignore that deed because of the want of Buchanan's evidence. It was confusing and misleading to the jury and distracted their attention from the real litigation involved, and it should not have been given.

Davis *v.* Patrick, 122 U. S., 138;
Beaver *v.* Taylor, 1 Wall., 637.

9.

The court erred in instructing the jury, as follows:

"With reference to the deed from McMillen to Hegler, it may be very different. There are subscribing witnesses to that copy that is here presented in evidence. Who undertook to account for their absence? Does it appear that any effort whatever has been made to procure the testimony of the subscribing witnesses to that deed? So far as I remember, there is none whatever; but other testimony has been let in because of the peculiarity of this case. There has been no effort made to produce the testimony of the subscribing witnesses on account of their absence. As I said before, the circumstances attending that may be suspicious. The deed might have been fixed up for the purpose. When the best testimony is accessible, that, of course, ought to be produced, and if it is not produced the absence of it is usually a very suspicious circumstance, and the jury can attach such weight to that fact as it sees proper in its own discretion" (Rec., 46).

What was said in the eighth assignment of errors, in the main, applies with full force here. A stronger reason

can still be added to that assignment. This deed was all regular on its face, with regular execution and acknowledgment, and proved itself, and, absence of the original being accounted for, the record was admissible. The admissibility of the record does not at all depend on whether the grantor's title is good at the time of the conveyance or not. Whether the deed from Nucholls to Ballard was of any validity or not could not affect the law of evidence on the introduction of the deed from McMillen to Hegler. The statutes of Nebraska then and still in force provided for either acknowledgment or proof of the execution of deeds, and in either case, of the acknowledgment or proof, the deeds were entitled to be recorded. If acknowledged, the evidence thereof should be the certificate of the officer taking the acknowledgment.

"SEC. 13. Every deed acknowledged or proved and certified by any of the officers before named, including the certificate specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded."

Rev. Stat. Neb., 1866, p. 282, § 13.

That statute was in force in 1859 and has been ever since. Under this law it is not necessary to account for the original at all before introducing the record, but in this case it was done.

Burbank *v.* Ellis, 7 Neb., 157;
2 Greenl. Ev. (14th ed.), § 299, and note;
3 Wash. R. P. (3d ed.), 288; original ed., vol. 2, 594, and cases cited.

The certificate of acknowledgment is *prima facie* proof, and to impeach it the evidence "should be extremely clear."

Morris *v.* Sargent, 18 Iowa, 90;
Von Onnem *v.* McGryn, 23 Iowa, 300;
Best Pres., 64 and 65.

These authorities apply with full force to the fifth assignment of error, to which the attention of the court is specially invited.

10.

The court erred in instructing the jury, that if George Washington was not twenty-one years old when he conveyed to Nucholls, nor made representation that he was, the defendant is entitled to recover (Rec., 47). This is erroneous, because it ignores the question of disaffirmance within a reasonable time after becoming of age.

11.

The court erred in instructing the jury as follows:

"There might be some question about the rescinding of the contract within a reasonable time, but if the testimony should satisfy the jury that George Washington was but fifteen or sixteen years old, or thereabout, in 1859, when it is claimed to have made the deed to Houston Nucholls, then it would take until 1865 for him to attain his majority, and he would have to disaffirm the contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time" (Rec., 47).

This erroneously states the law as applicable to this case. It will be discussed further on under the heading "Infancy."

Infancy.

The statutes then in force in Nebraska, so far as applicable to this case, are as follows:

"SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or

property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority.

"SEC. 43: No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting."

Sess. Laws Neb., 2d session, p. 165.

This act was taken from Iowa.

Iowa Code 1851, chap. 87, p. 224;
Oswald & Co. *v.* Broderick & Co., 1 Iowa, 380;
Proutz *v.* Edgar, 6 Iowa, 353.

A reasonable time for an infant to disaffirm is not a question of law, as held by the court, but a question of fact to be determined upon the circumstances of each case.

Jenkins *v.* Jenkins, 12 Iowa, 195;
Stout *v.* Morrill, 35 Iowa, 47;
1 Greenl. Ev., § 49 (14 ed.).

Two years is an unreasonable time, but the court in this case erroneously instructed that, as a matter of law, a year or so was not unreasonable.

Wright *v.* German, 21 Iowa, 585.

At the time of the transactions involved herein, the law of Nebraska limiting the time for infants to sue after coming of age was as follows:

"SEC. 246. The above limitations of action for the recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions."

Sess. Laws Nebraska, 1st sess., p. 81, sec. 246.

By analogy we can fairly say that, unless there be special circumstances taking the case out of the general

rule, infants must disaffirm deeds within one year after becoming of age.

The evidence in this case made George Washington all sorts of ages; some made him over twenty-one years and some much under; but if the first answer of defendants in this controversy was correct, and he was sixteen (16) years old in 1859, as they say in that answer, he was twenty-three years old in December, 1866, when defendants got their first deed, and twenty-five years old when they got the second deed; in either case too late to disaffirm.

The act of 1856 above quoted was repealed without any retroactive clause in 1864.

Sess. Laws, 9 Neb. Ter. Sess., p. 92, sec. 1.

The law of 1856 governs this case.

See Judge Cooley's Pamphlet on "Effect of Change of Law on Right of Action;"

Endl. Int. St., §§ 478–487.

Defendants not Innocent.

Defendant Towle negotiated for defendants' title, and he at the time knew of Hegler's title (see Towle's testimony, Rec., 15). Hegler was then in possession, paying taxes (see Hegler's testimony, Rec., 28–32); but as matter of law defendants could not have been innocent purchasers, because the warranty deed from George Washington to Nucholls was regular and duly recorded, and it matters not whether any of the subsequent deeds through which plaintiff claims were on record or not, since the records then showed that the defendants' grantor, George Washington, was not the owner of the land. (3 Wash. R. P. (3d ed.), 285–292.)

Bates *v.* Norcross, 14 Pick., 224–231;

Levy *v.* Dollarhide, 24 Col., 218.

For the purposes of this case, since the deed from George Washington to Nucholls was a warranty, it

makes no difference that the subsequent deeds in plaintiff's chain were special warranties.

A superficial glance over this record will convince this court, the great fundamental error committed by the court below was, in permitting itself to go behind the finding and judgment of the President of the United States through a branch of the executive department of the Government, in matters committed especially to the President by Congress. The allotment of these lands to the half-breeds was expressly devolved upon the President by act of Congress (10 St. L., p. 332) in order to carry out the treaty of July 15th, 1830 (7 St. L., *sup.*). This act of Congress was one making appropriations for the *Indian Department and for fulfilling treaty stipulations.* The branch of the executive department of the Government having charge of Indian affairs, under the direction of the President, made rules and regulations to enforce this provision of law, and did enforce it. This, in law, was the act of the President, of course.

Wilcox *v.* Jackson, 13 Pet., 498;
U. S. *v.* Stone, 2 Wall., 537;
Confiscation Cases, 20 *Ib.*, 109;
U. S. *v.* Farden, 99 U. S., 19;
Wolsey *v.* Chapman, 101 *Ib.*, 769.

Under this proceeding plaintiff's title arises. It comes to him under and by the finding of an officer or special tribunal, and is, therefore, final and conclusive, unless assailed directly and overthrown.

Freeman Judgt., sec. 524 and notes;
Brown Jurisd., sec. 23 and notes.

Every essential fact necessary to the finding or judgment, is presumed to have existed in the mind of the officer or tribunal when it was made and rendered.

Stanly *v.* Supervisors, &c., 121 U. S., 535;
Williams *v.* Supervisors, &c., 122 *Ib.*, 154;
Veach *v.* Rice, 131 *Ib.*, 293;
Thaw *v.* Ritchie, 136 *Ib.*, 519.

So, upon common familiar principles, this allotment could not be questioned in this manner.

But then the question stands here on a little higher and a little more conspicuous ground, than that of a finding ordinarily by a court of special jurisdiction. Here we have a matter belonging, in the necessity of things, to the executive branch of the Government, and then placed there in so many words by act of Congress. The power is given to the President to carry out and enforce these treaty stipulations, and he is left to fix and arrange his own means of so doing. It is hardly worth while to cite authorities to show, that where a power is given, but no method is designated for its execution, the party to whom the power is given is free to select the method.

1 Story Const., sec. 430 (Cooley's ed.).

The President, under this law, called upon the Indian Bureau, a part of the Interior Department, as the record shows, to do this, and it was done, and in its doing all questions of age, breed, and of whatever else was required under the treaty to authorize the finding or judgment, are supposed to have been found, and can not under ordinary rules be questioned in this way, and certainly they can not be so questioned by any co-ordinate branch of the Government. It is surrounded with this sanctity as well as that of the judgment of a court of competent jurisdiction. It is *res adjudicata* in the highest and best sense of the term, and in every sense of it.

Johnson *v.* Towsley, 13 Wall., 72;

1 Lawrence Decis., 262–286 (case of Safford & Cc.);

3 *Ib.*, p. XIV, *et seq.*; *Ib.*, 60–87, where there are many cases collected, commented on, and applied;

Martin *v.* Mott, 12 Wheat., 19;

Allen *v.* Blunt, 3 Story, C. C., 745.

This order or judgment has never been appealed

from; it has never been charged or attacked directly with fraud or mistake, and if this finding is to be disregarded because of proof, or supposed proof as to age or any other fact in a proceeding of this kind, then this determination of the executive is utterly worthless for any purpose.

See how iron-bound are the final findings—the decisions of the departments—as against all attacks of the incoming heads of those departments, just as much as the decisions of the courts are as against the attacks of new and succeeding judges in those courts, and it must naturally be so.

The U. S. *v.* Bank, &c., 15 Pet., 377;
Ex parte Randolph, 2 Brock., 447; 5 Op., 187; *Ib.*, 240; 6 *Ib.*, 697; 9 *Ib.*, 387; 12 *Ib.*, 355;
Lawrence Decis., *sup.*

And how else could public business be transacted and the Government relations kept up and enforced?

These papers from the Interior Department were competent as offered, and should have been received in evidence.

R. S., sec. 882–4;
U. S. *v.* Perchman, 7 Pet., 51;
U. S. *v.* Williams, 14 *Ib.*, 334;
U. S. *v.* Davenport, 15 Howard, 7;
Culver *v.* Uthe, 133 U. S., 655.

So that when the court below went back of this finding and rejected it, it travelled away beyond its authority and put aside all law, and here is the error, regardless of all others, that is fatal to this decision in that court, and it is hoped it will be reversed.

A. H. GARLAND and
H. J. MAY,
For Plaintiff.

Office, Supreme Court U. S.
FILED.
DEC 13 1893
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 166.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE FAULKNER ET AL, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF OF DEFENDANTS IN ERROR.

JOURNAL PRINT, FALLS CITY, NEB.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 166.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE FAULKNER ET AL, DEFENDANTS IN ERROR.

Brief of Defendants in Error.

This is an action of ejectment; was tried to a jury in in the court below, and a verdict returned for the defendants, upon which the court entered judgment. It now comes into this court on writ of error. As we understand the position of plaintiff in error, he claims that the trial court erred in several particulars, among which are the following:

1.

In the first assignment of error complaint is made that the court erred in excluding as evidence a certified copy of the instructions given Special Agent Stark by the Interior Department, for his guidance in the discharge of his duties as allotment commissioner. It is submitted that no error was committed by the court in excluding those instructions as they tended to prove no issue in

the case. The all controlling question was the age of the half-breed, George Washington, and surely it can not be said that the instructions given to Stark by the chief of the department at Washington, were competent to prove that fact. The duties of Stark were in no sense judicial and his statements about the ages of the half-breeds were in no sense adjudications. The right of the half-breeds to land under the treaty did not depend upon their ages, and Stark's statement about their ages could serve no purpose except for identification.

2.

In the second assignment of error it is claimed that the court erred in excluding as evidence the list made by Commissioner Stark of the half-breeds entitled to lands, dated February 4th, 1858. The only object in offering the list was to prove the age of George Washington at that time. It is submitted that the list was clearly incompetent for that purpose. If it were admissible for any purpose, it must come within the rule which admits in evidence, "official registers or records kept by persons in public office, to write down particular transactions occurring in the course of their public duties or under their particular observation."

1 Greenleaf Ev., Sec. 483.
Taylor on Evidence, Sec. 1429.

We do not think this list can be considered an official register, but if it can be so considered, we contend that neither by statute, nor by nature of his office, was Stark required to write down the ages of the persons entitled to lands, and certainly that fact could not come under his particular observation. Stark could not find

out their ages except from hearsay, and he was not appointed to hear testimony and adjudicate on that fact. In 1st Greenleaf's Ev., Sec. 493, it is said, "But it is to be remembered that they (official registers) are not in general evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus a parish register is evidence only of the time of marriage, and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry. So a register of baptism taken by itself, is evidence only of that fact Neither is the mention of the child's age in the register of christenings proof of the day of its birth, to support a plea of infancy." In *Mutual Ben. L. Ins. Co. vs. Tisdale, 1 Otto. 238*, it is said, "A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and is of good moral character. This certificate is, against all the world a judgment of citizenship from which may follow the right to vote and hold property. It is conclusive as such; but it cannot in a distinct proceeding, be introduced as evidence of residence or age at any particular time or place, or of the good character of the applicant."

Campbell vs. Gorden, 6 Cranch 176.
Stark vs. Ins. Co., 7 Cranch 420.

In Ins. Co. vs. Schwenk, 94 U. S. 593, this court held "An entry in the minute book of a lodge of Odd Fellows of which the deceased assured was a member made prior to the issue of the policy, and showing his age as recorded by the secretary of the lodge in the usual manner of

keeping its records, is not admissible as evidence of such age. It is merely hearsay."

3.

See also Chaffee & Co. vs. U. S., 18th Wallace 516.

It is contended by plaintiff in error that when George Washington conveyed to Houston Nuckolls he represented that he was then of age, and that he was bound by his statement. The only proof of such a statement was that the acknowledgment of the deed to Nuckolls contains these words: "I further state that I am twenty-one years of age." (See transcript page 19.) We submit that the certificate of acknowledgment can not be evidence of anything which the law does not require to be stated therein.

All that the statute required was that the grantor should "acknowledge the instrument to be his voluntary act and deed." On page 27 of transcript C. F. Walther, the officer before whom the acknowledgment was made, states that he wrote in those words because Nuckolls (not George Washington,) told him to put them in. George Washington could not understand English, and all that he did was through an interpreter. There is no evidence that George Washington made any statements about his age. The principal question in this cause was as to the age of George Washington. We suppose that the age of a party is to be proved like any other fact, by evidence competent for that purpose. The report of Stark on that subject was mere hearsay and inadmissible. All of the oral testimony was to the effect that when George Washington made the deed to Nuckolls he was an infant. The

question of his age was submitted to the jury under all the evidence and they found that he was then an infant. It is also contended by plaintiff in error that if George Washington was an infant when he made his deed to Nuckolls he did not disaffirm within a reasonable time. That deed was made April 16th, 1859, and the great preponderance of the testimony shows that at that time George Washington was about 14 years of age. The Rev. Samuel Irvin testifies that he was missionary to the Indian tribe from 1837 to 1860; that he knew the family of Laggarash since 1839, to identify its members; that it was a large and distinguished family; that he knew George Washington and had known him from his birth, that he belonged to the Iowa tribe and to the family of Laggarash; that his conviction is that George Washington was born in 1846. Daniel Vanderslice testifies that he was Indian Agent from 1852, till 1860, and that he was acquainted with George Washington, son of Laggarash, and George Washington was frequently in his office. He further says that George Washington was under his charge as Indian agent, and that "to the best of my recollection George Washington was about 7 years old when I first knew him to identify him, consequently he is now (Oct. 26th, 1875) 28 or 29 years of age." According to the above testimony George Washington was born about 1846, and he was not over 14 years of age when the deed to Nuckolls was made, and he became of age in 1867. George Washington made a deed of land in controversy to Schoenheit & Towle on Nov. 3d, 1866, and afterwards he and his wife made another deed to E. S. Towle on Feb. 28th, 1868. It is under both of these deeds that defendants in error claim title. It seems therefore that the disaffirmance must certainly

have been made within a reasonable time. If George Washington was of age when the first of the above deeds was made his disaffirmance was made shortly after becoming of age. If however he became of age in 1867, the disaffirmance made by the second deed was made within about a year after he became of age. Under all the authorities this must have been within a reasonable time. The court told the jury that if the disaffirmance was made within a year or so it would be sufficient. What is a reasonable time must be determined by the circumstances of the particular case. In this case the jury must have found under the instructions of the court and the testimony adduced that the disaffirmance was made within a reasonable time. It is contended by plaintiff in error that the court erred in excluding as evidence the first answer filed by defendants. A second and amended answer was filed, and it was on that the case was tried. We think there was no error in excluding the first answer. This answer if admitted could not tend to prove any issue in this case. It contained no admission which could be of any benefit to plaintiff in error. We think moreover that the general rule is that abandoned or amended pleadings cannot be used in evidence in the same case.

Baldwin vs. Gregg, 13 Mete. (Mass.) 233.
Walcott vs. Kimball, 13 Allen (Mass.) 460.
Corley vs. McKeag, 9 Mo. App. 38.
Johnson vs. Bank, 28 Neb. 796.

Complaint is also made of the instructions given the jury in the trial court. First, because they were confusing to the jury. We do not see how this can be true. It was necessary for the plaintiff to make out a *prima facie*

case: that is, show an affirmative legal title to the land in controversy in himself; and this could only be done by producing proper evidence of mesne conveyances from the general government down to himself.

Now, what did he do? Some of the original deeds were lost; and resort was had to certified copies of their record from the county clerk's office where by law, they were required to be recorded.

Objection was made to the introduction of these copies on various grounds, but the court allowed them all to go to the jury. True the trial judge discusses those copies, and the propriety of admitting them in evidence, *but he did admit them.* We deny that the plaintiff made out a *prima facie* case; and if the court committed any error at all in that particular, it was by permitting the deeds from Washington to Nuckolls, and the deed from Nuckolls to Ballard to be read in evidence to the jury. The testimony of Walthers, the justice of the peace who took the pretended acknowledgment of the deed of Washington to Nuckolls, makes it entirely clear that the Indian boy Washington knew nothing whatever of what was going on when the deed was made. True, something was said about an interpreter, but it was not proved that the contents of the deed were made known to Washington, nor that he was made to understand the nature and office of the deed, nor indeed, anything else of an intelligent character touching the farcial transactions there transpiring in his presence. It does not appear that anything at all was said to the Indian, or that he said anything to anybody himself, while the comedy was being enacted. The phrase, "I am twenty-one years old," can have no refer-

ence to anybody but the justice of the peace; and it was probably the only truth told that day, for there is little doubt that the officer Walther, was twenty-one years old at that time.

Could any jury of fair mind say, from the testimony that the Indian Washington affixed his mark of assent to that deed knowing what it was?

Can this court say as much? We hardly think so. The Indian could speak no language but his own, (and even that was not used on this occasion), and must have been entirely ignorant of all the customs of civilized men concerning the conveyance of land by written deed. The ink was hardly dry on the certificate of allotment made out by Stark until Nuckolls had this pretended deed from the Indian for the magnificent consideration of a pony and $50.00; and four days afterwards Nuckolls sold (the land) to A. S. Ballard for the consideration of $1,200.00. Not a bad speculation, considering the amount invested. But who was Ballard? Stark, the alloting agent, swears that he (Ballard) was then of Aspinwall in Nebraska, but the truth is he had gone out from Ohio with Stark in this alloting business, and to do just what he did do,—gather in as much of this Indian land as possible. Stark must have had some interest in the business or he would not have known so much about the deeds that passed between the several parties who have figured as owners of this land.

The certified copy of the record of the deed from Nuckolls to Ballard was not admissible at all for any purpose, as the description was fatally uncertain, and therefore was not entitled to be recorded under the laws of Ne-

braska. It did not describe the land in controversy, the township having been left out. The record should have been corrected, but that could only be done in a court of equity in an independent proceeding for that purpose. Certainly it could not be done in an action of ejectment, no matter what the original deed contained. A defectively recorded deed (the original being lost), cannot be used in evidence to show title in anybody.

Nevertheless, the court did allow the Nuckolls-Ballard deed to go to the jury. The error, if any was committed, was in favor of the plaintiff and he has nothing to complain of.

Clarke's Lessees vs. Courtnay, 5 Peters 34.

Sec. 4337 of Chapter 47 entitled Real Estate, provides as follows: "Every deed acknowledged or proved, and certified by any of the officers before named, including the certificates specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded.

The record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control. Neither the certificate of the acknowledgment or the proof of any deed, nor the record or the transcript of the record, of such deed, shall be conclusive, but may be rebutted, and the force and ef-

fect thereof may be contested by any party affected thereby &c."

Consolidated Statutes of Nebraska, page 926.

As the record of the deed from Nuckolls to Ballard did not describe the land in controversy, nor indeed, any other land, it was inadmissible for any purpose, and should have been excluded from the jury under the objection of the defendants. It does not lie in the mouth of the plaintiff in error to complain of the action of the court, for the transcript of the record of that deed was admitted in evidence and read to the jury as explained by the testimony of Stark. The testimony of Stark would be proper in a cause on the equity side of the Federal courts to reform the record of a lost deed, but it was wholly incompetent to establish legal title in this case, and was improperly admitted. In the case of John Foster and others vs. Francis Mora, 8 Otto. 425, this court held: "In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts."

It was incumbent on the plaintiff to make out a *prima facie* legal title. This could only be done by showing a continuous chain of legal conveyances from the United States down to himself. Under the pleadings in the case, possession by the defendants is admitted, as the title of the plaintiff is expressly denied in the answer. Sec. 5173 of the Code of Nebraska, Consolidated Statutes, page 1068.

That is title, and will prevail against any person not having a better one. It is a familiar and universal prop-

osition of law that a claimant must recover, if at all, on the strength of his own title, and not on the weakness of that of the other party. The predicate of title in the plaintiff is a paper title, consisting of mesne conveyances from the government down. These several conveyances must establish as valid deeds conveying the legal title in every instance, or it cannot be said that a *prima facie* case has been made out. Until that is done the defendants are not called upon to prove anything. No amount of equities will make out a legal title. On this subject we have already stated the rule of procedure in the National courts.

Having admitted the defective deeds in evidence, it was not improper for the court to instruct the jury concerning such defective qualities, but the better practice would have been to exclude them entirely; and remit the plaintiff to his remedy in a proper equitable proceeding to reform the deeds, if that were possible. Whatever of error the court committed in its action concerning the admission of these deeds, and its instructions touching the same, was in favor of the plaintiff; and therefore could not prejudice his legal rights.

The all controlling question in this case, however, is the age of the Indian George Washington, at the time Nuckolls obtained his pretended deed from him for the land in question. That is a question of fact purely, and was properly submitted to the jury. The testimony is all in the record; and it is agreed by plaintiff in error to be the principal question for determination. The jury were told that if they found from the evidence that the Indian was an infant when it is alleged he made the deed; and that he

disaffirmed the sale to Nuckolls within a year or so after attaining his majority, that would be sufficient, and the latter conveyance would carry the title. There was no error in that instruction. What is a reasonable time is not a question of law. It will depend upon the circumstances of the particular case. In this case, the court thought a year or so would be a reasonable time. The jury thought so too, and found generally for the defendants; and their finding is conclusive of the fact, and the judgment shold be affirmed.

ISHAM REAVIS,
C. F. REAVIS,
Attorneys for Defendants in Error.

30 No. of school dist.	Name of owner.	Value of personalty.	Lands. Description.	Section.	Town.	Range.	Value of land & improvements.	Value of improvement on public land.	City and town lots. Lots.	Block.	Name of town.	Value of lots and improvements.	Total valuation.	Total tax.	31 County tax.	State tax.	School tax.	Road tax.	Interest on Co. warrants.	State institute.	Capitol.	Stock inspection.	Military poll.	Poll tax.	Special school tax. No. of dist.	Valuation.	Am't of tax.	Tax.	Tax.	Interest on tax.	Advertising on tax.	Delinquent tax.	Total tax.	Remarks.
		Dolls.					*Doll.*	*Doll.*					*Doll.*	*Doll.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*		*Doli.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	*Doll. cts.*	
													1,552 30	------	1,552 30	543 30	310 46	776 15	310 46	186 27	77 61	10 34	as offered	to Co. co	mm'rs.								3,766 89	
	Haley, Ora	1,705 20	S. ½ section, # of acres 960.	---	---	---	37 80	8 "	---	---	---	------	1,751 00	------	1,751	612 85	358 20	875 50	350 20	210 12	87 55	11 57	---	---	---	---	---	---	---	---	---	---	---	4,248 09	

STATE OF COLORADO, *County of Routt,* } *ss:* I, I. G. Voice, deputy treasurer in and for said county and State, do hereby certify the annexed is a correct and true copy of Ora Haley assessment of 1884, taken from the abstract of assessment of 1884.
Witness my hand and seal this 16th day of November, 1887.

I. G. VOICE, *Dept. Treas.* [SEAL.]

32 No. of school dist.	Name of owner.	Value of personalty.	Lands. Description.	Sec.	Town.	Range.	Value of land and improvements.	Value of improvements on public land.	City and town lots. Lots.	Block.	Name of town.	Value of lots and improvement.	Total valuation.	Total tax.	33 County tax.	State tax.	School tax.	Road tax.	Interest Co. warrants.	State instit.	Capitol.	Stock insp.	Military poll.	Poll tax.	Special school tax. No. of dist.	Valuation.	Am't of tax.	Tax.	Tax.	Interest on tax.	Advertising on tax.	Delinquent tax.	Total tax.	Remarks.
	Iles, Geo. L.	----------	S. ½ S. E. ¼ N. ½ N. E. ¼, 160 acres.	20 17	6	91	500	----------	---	---	----------	-----	500	------	5	1 75	1 00	2 50	1 00	60	25	04	---	---	---	---	---	---	---	---	---	---	---	12 14	

STATE OF COLORADO, *County of Routt,* } *ss:* I, I. G. Voice, deputy treasurer in and for said county and State, do hereby certify that the annexed is a correct and true copy of the first name as assessed on I & J for the year 1884 on the abstract of assessment.
Witness my hand and seal this 16th day of November, 1887.

I. G. VOICE, *Dept. Treas.* [SEAL.]

34 No. of school dist.	Name of owner.	Value of personalty.	Lands. Description.	Section.	Town.	Range.	Value of land and improvement.	Value of improvements on public lands.	City and town lots. Lots.	Block.	Name of town.	Value of lots and improvement.	Total valuation.	Total tax.	35 County tax.	State tax.	School tax.	Road tax.	Interest Co. warrants.	State inst.	Capitol.	Stock inspect.	Military poll.	Poll tax.	Special school tax. No. of dist.	Valuation.	Am't of tax.	Tax.	Tax.	Interest on tax.	Advertising on tax.	Delinquent tax.	Total tax.	Remarks.
	France, James	100 00	----------	---	---	---	------	----------	---	---	----------	-----	10,000 00	------	100 00	35 00	20 00	50 00	20 00	12 00	5 00	67	---	---	---	---	---	---	---	---	---	---	---	242 67	Paid.

STATE OF COLORADO, *County of Routt,* } *ss:* I, I. G. Voice, deputy county treasurer in and for said county and State, do hereby certify that the annexed is a correct and true copy of page- F & G of the abstract of assessment for the year 1884.
Witness my hand — seal this 16th day of November, 1887.

I. G. VOICE, *Dept. Treas.* [SEAL.]

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No. of school district.	Name of owner.	Value of personally.	Lands. Description.	Section.	Town.	Range.	Value of lands and improvements.	Value of improvements on public lands.	City and town lots. Lots.	Block.	Name of town.	Value of lots and improvement.	Total valuation.	Total tax.
		$ Doll.					$ Doll.	$ Doll.					$ Doll.	$ Doll.
	Haley, Ora	170,520	Six ½ sections; # of acres, 960.	---	---	---	3,780	800	---	---	---	---	155,230	------
													175,100	------

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No. of school district.	Name of owner.	County tax.	State tax.	School tax.	Road tax.	Interest on Co. warrants.	State institutions.	Capitol tax.	Stock inspection.	Agricultural College tax.	Poll tax.	Special school tax. No. of dist.	Special school tax. Valuation.	Special school tax. Am't of tax.	Tax.	Tax.	Interest on tax.	Advertising on tax.	Delinquent tax.	Total tax.	Remarks.
		$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.		$ Doll.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	$ Doll. cts.	
	Haley, Ora	1,552 30	543 30	310 46	776 15	310 46	186 27	77 61	10 34	as offered	to Co. by	com	missio	ners.	------	------	------	------	------	3,766 89	Paid August 21, 1888.
		1,751 00	612 85	350 20	875 50	350 20	210 12	87 55	11 67	------	------	---	------	------	------	------	------	------	------	4,248 59	

STATE OF COLORADO, *County of Routt*, } ss:

OFFICE OF COUNTY CLERK AND RECORDER, ROUTT COUNTY, COLORADO, HAHN'S PEAK, *Nov. 1st*, 1884.

To the treasurer of Routt county, Greeting:

You are hereby notified and commanded to collect the foregoing taxes levied by State and county authorities for the year 1884 as required by law, and this shall be your warrant therefor.

Witness my hand and official seal this first day of November, A. D. 1884.

C. BRANDEGEE, *County Clerk*,
By I. G. VOICE, *Dept.*

Ex. D. 3.

STATE OF COLORADO, *County of Routt*, } ss:

I, S. D. Wilson, treasurer of Routt county, Colorado, do hereby certify that the above and foregoing statement is a true, full, and complete copy of the abstract of assessment, tax-list, and warrant for the collection of Ora Haley's taxes for the year A. D. 1884 as the same appears upon the treasurer's tax books of Routt county, Colorado, now in my office, including a pencil interlineation above the ink figures, said to have been a memorandum of an offer of county commissioners to compromise with said Haley.

Witness my hand and seal this 11th day of January, A. D. 1889.

S. D. WILSON, *Treasurer of Routt Co., Colo.*

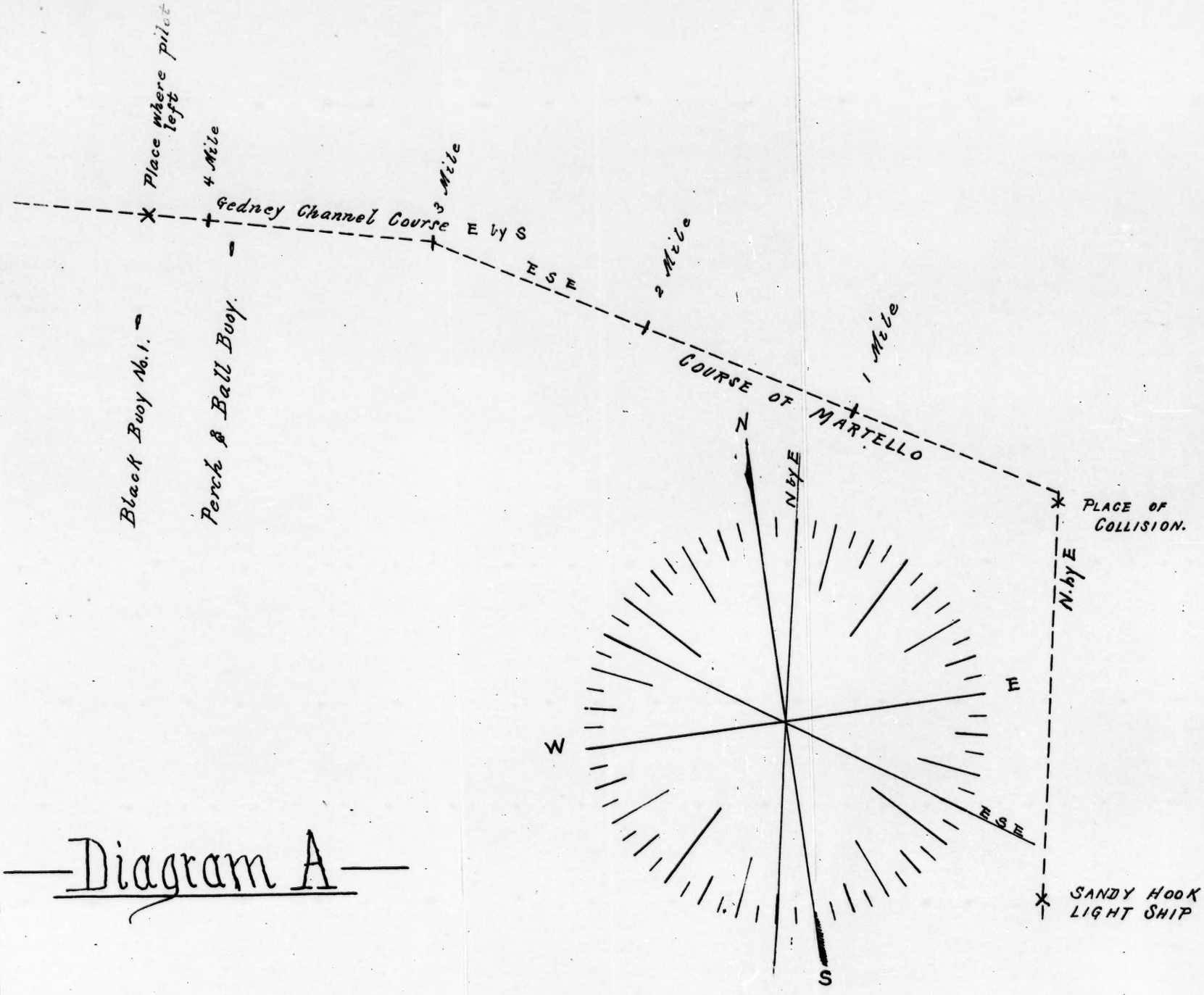
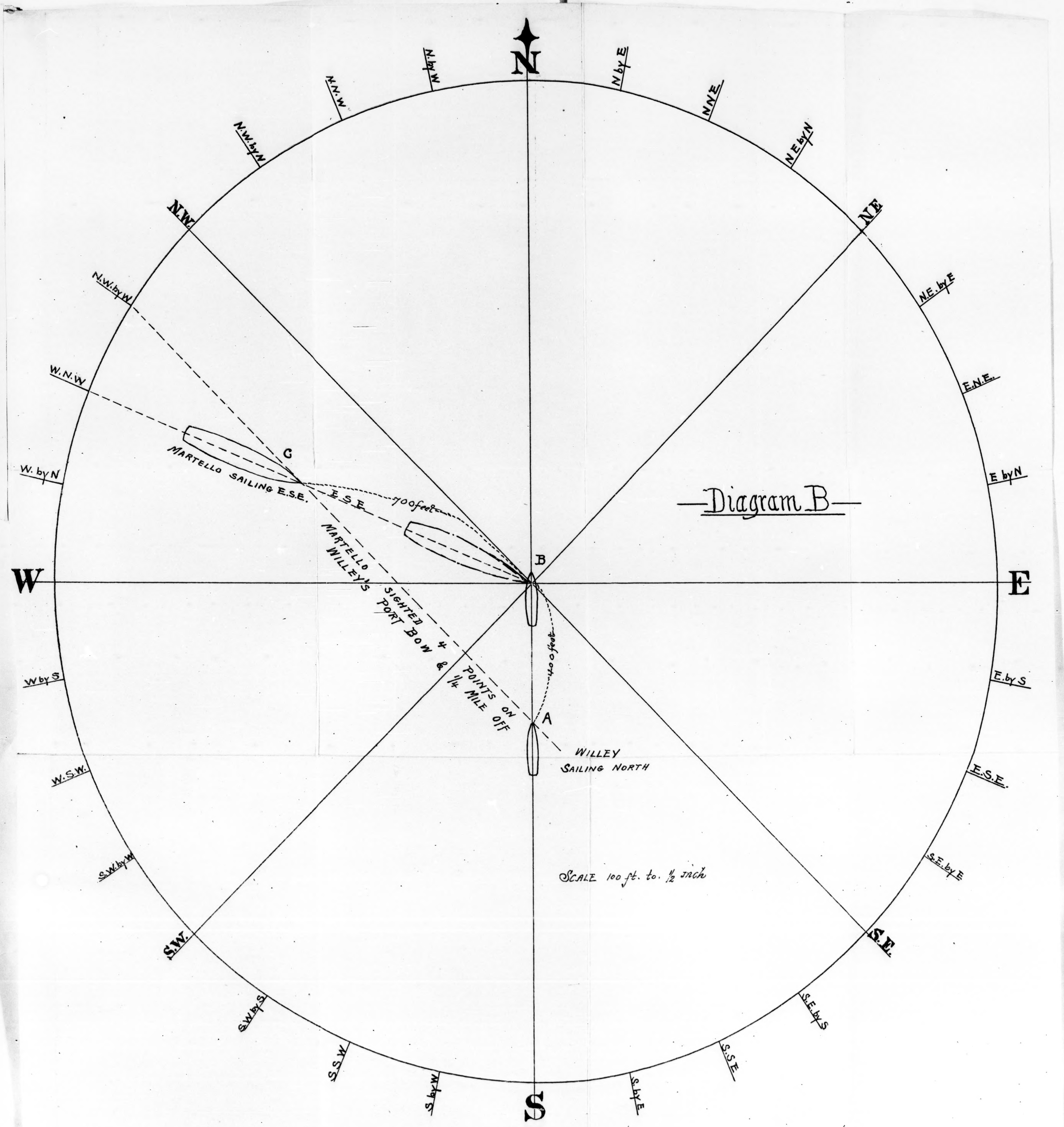


Diagram A

Scale in Nautical miles

¼ ½ ¾ 1m 2m


N
N by E
N.N.E
N.E by N
N.E
N.E. by E
E.N.E.
E by N
E
E. by S
E.S.E.
S.E. by E
S.E.
S.E. by S
S.S.E
S by E
S
S by W
S.S.W
S.W by S
S.W.
S.W. by W
W.S.W.
W by S
W
W. by N
W.N.W
N.W. by W
N.W.
N.W. by N
N.N.W
N by W
MARTELLO SAILING E.S.E.
C
E S E
700 feet
MARTELLO SIGHTED 4 POINTS ON WILLEY'S PORT BOW & 1/4 MILE OFF
B
700 feet
A
WILLEY SAILING NORTH
Diagram B
SCALE 100 ft. to. 1/2 inch